

San Francisco Law Library

436 CITY HALL

No. 137688

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

2525
No. 11900

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant.

vs.

MARCELLUS B. HAYES and MARY I. HAYES,
Also Known as Bell Hayes, Husband and Wife;
ADELBERT M. HAYES, and HARNEY
COUNTY, a Municipal Corporation and Po-
litical Subdivision of the State of Oregon,
Appellees,
and

MARCELLUS B. HAYES and MARY I. HAYES,
Also Known as Bell Hayes, Husband and Wife;
and **ADELBERT M. HAYES,**
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the District of Oregon

FILED

SEP 1 - 1948

No. 11900

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant.
vs.

MARCELLUS B. HAYES and MARY I. HAYES,
Also Known as Bell Hayes, Husband and Wife;
ADELBERT M. HAYES, and HARNEY
COUNTY, a Municipal Corporation and Po-
litical Subdivision of the State of Oregon,
Appellees,
and

MARCELLUS B. HAYES and MARY I. HAYES,
Also Known as Bell Hayes, Husband and Wife;
and ADELBERT M. HAYES,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Complaint in Condemnation.....	9
Answer of Bell Hayes and Marcellus B. Hayes.	18
Appeal:	
Bond for Costs on.....	64
Designation by Cross-Appellants of Con- tents of Record on.....	352
Designation of Contents of Record on.....	77
Motion for Leave to File Bond on.....	63
Motion for Time to File and Docket.....	65
Notice of.....	61
Notice of Cross.....	62
Order Allowing Filing Bond on.....	64
Order Extending Time to File and Docket.	68
Bond for Costs on Appeal.....	64
Clerk's Certificate.....	80
Complaint in Condemnation.....	2
Declaration of Taking.....	23
Designation by Cross-Appellants of Contents of Record on Appeal.....	352

INDEX	PAGE
Designation of Contents of Record on Appeal..	77
Docket Entries.....	73
Instructions to the Jury.....	324
Judgment on Declaration of Taking and Order Granting Immediate Possession.....	36
Judgment on Verdict.....	56
Motion for Leave to File Bond on Appeal.....	63
Motion for Time to File and Docket Appeal...	65
Motion to Set Aside Verdict of the Jury.....	59
Motion to Strike Further and Separate Reply of the United States to the Further and Sepa- rate Answer of the Defendants Hereinafter Named	53
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	61
Notice of Cross-Appeal.....	62
Order Allowing Filing Bond on Appeal.....	64
Order of Dismissal.....	60
Order Extending Time to File and Docket Appeal	68
Order Granting Leave to File Amended Com- plaint in Condemnation.....	9
Order Granting Leave to File Second Amended Complaint in Condemnation.....	26

INDEX	PAGE
Order Transmitting Original Exhibits.....	73
Reply to Answer of Defendants Bell Hayes and Marcellus B. Hayes.....	40
Exhibit A—Agreement for Aquisition of Lands, Including Acceptance by Plaintiff.....	46
Second Amended Complaint in Condemnation.	27
Statement of Points and Designation of Record for Printing.....	350
Statement of Points to Be Relied on by Cross- Appellants	71
Statement of Points to Be Relied Upon by Cross-Appellants	351
Statement of Points to Be Relied Upon by Plaintiff-Appellant	69
Summons	7
Summons on Amended Complaint.....	15
Summons on Second Amended Complaint.....	34
Transcript of Proceedings.....	82
Exhibit, Defendants:	
No. 3—Letter dated Oct. 1, 1946, to M. B. Hayes.....	100
Exhibits, Government's:	
No. 1—Map of M. B. Hayes Tract....	87
No. 2—Letter to M. B. Hayes—Letter to Adelbert M. Hayes.....	92

	INDEX	PAGE
Witnesses, Defendants:		
Ausmus, J. O.		
—direct		222
—cross		231
Boylan, Bert C.		
—direct		132
—cross		231
Cozad, R. D.		
—direct		256
—cross		260
Hayes, Adelbert M.		
—direct		169
—cross		185
—redirect		193, 198, 199
—recross		196, 198, 199
Hayes, Marcellus B.		
—direct		115, 201
—cross		122, 211
—redirect		125, 220
—recross		128
Hayes, Mary I.		
—direct		94, 130, 264
—cross		109, 131
Howard, Frank		
—direct		237
—cross		242
—redirect		253
—recross		254

INDEX

PAGE

Witnesses, Government's:

Dryer, Horace A.

—direct 306

—cross 311

Schaar, Roland

—direct 143

—cross 145

Scharf, John

—direct 278

—cross 281

Toucey, Bert J. G.

—direct 268

—cross 272

Woodward, Doren E.

—direct 136, 287

—cross 139, 292, 304

Verdict of the Jury.....55, 57

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

HENRY L. HESS,

United States Attorney;

LINUS M. FULLER and
BERT C. BOYLAN,

Special Assistants to United States Attorney,
U. S. Court House,
Portland, Oregon,

For Appellant and Appellee, U. S. A.

J. W. McCULLOCH,
EDWIN D. HICKS and
THOMAS H. TONGUE,

Yeon Bldg.,
Portland, Oregon,

For Marcellus B. Hayes, Mary I. Hayes
and Adelbert M. Hayes, Appellees and
Cross-Appellants;

LELAND S. DUNCAN,

Burns, Oregon,

For Harney County, Oregon.

In the District Court of the United States
for the District of Oregon

Civil No. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BELLE HAYES and MARCELLUS B. HAYES,
Wife and Husband; and HARNEY COUNTY,
a Municipal Corporation and Political Sub-
division of the State of Oregon,

Defendants.

COMPLAINT IN CONDEMNATION

Comes now the plaintiff, the United States of America, by its attorneys, and for cause of action respectfully represents to this Honorable Court as follows:

I.

That this proceeding is instituted in accordance with and under the authority of the following Acts of Congress, to wit:

The Act of August 1, 1888 (25 Stat. 357—
U.S.C. Title 40, Sec. 257);

The Migratory Bird Conservation Act of
February 18, 1929 (45 Stat. 1222-U.S.C. Title
16, Sec. 715) as supplemented and amended;

II.

That pursuant to and under the authority of the Acts of Congress above cited, the Assistant Secre-

tary of the Department of the Interior (1) has selected the hereinafter described lands for acquisition by the United States of America for the purposes of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended, for acquisition within the Malheur National Wildlife Refuge of Oregon, and has determined that such lands are necessary and suitable for the conservation of migratory game birds; (2) has determined and is of the opinion that it is necessary and advantageous to the government of the United States to acquire by condemnation under judicial process the estate or interest hereinafter set forth in and to the lands so selected and hereinafter described for public use in connection with the administration of the Malheur National Wildlife Refuge of Oregon; (3) has requested the Attorney General of the United States to institute this proceeding [1*] to acquire said estate in said lands, in pursuance of which request the Attorney General has directed this proceeding to be instituted;

III.

That the estate taken by the plaintiff in this proceeding for said public use is the fee simple title to the lands hereinafter described, together with all accretions and relictions and all and singular the water rights and other rights, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining;

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

IV.

That the lands, the estate of which is sought, as above set out by this proceeding, are located in Harney County, Oregon, within this judicial district, and are more particularly described as follows, to wit:

Tract 17: Township Twenty-Five (25) South (north of Malheur Lake), Range Thirty-Two (32) East, Willamette Meridian: In section thirty-six (36), lots two (2), three (3) and four (4), Southeast quarter Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$), and Northeast quarter Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$); and together therewith the attached riparian lands of the bed of Malheur Lake appertaining thereto, and Lake-bed Parcel 48; and

Bounded on the north, in part by land of F. A. Ruh and in part by land of the United States (tract 18); on the east by land of the United States (tract 18); on the south, in part by land of the United States (tract 41), in part by the W. E. Marshall Estate tract (61a) and the center line of Malheur Lake, and in part by the J. E. Graves tract (55a) and a wire fence; and on the west, in part by land of the United States (tract 16) and in part by the J. E. Graves tract (55); containing 1101.68 acres, be the same more or less;

The above-described tract of land is delineated on a map tracing designated M. B. Hayes Tract (17) bearing date of September 19, 1944, of record in the files of the Department of the

Interior. A print from that map tracing is attached hereto marked "Exhibit A" and by reference made a part of this Complaint;

V.

That the public use for which the estate above set out in the lands above described is sought is adequately to provide for an addition to and inclusion within the Malheur National Wildlife Refuge of Oregon, and for other uses incidental thereto under the provisions of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended;

VI.

That funds for the acquisition of said estate in said lands have been authorized and appropriated by the said Migratory Bird Conservation Act of [2] February 18, 1929, above cited, as supplemented and amended;

VII.

That plaintiff has caused diligent search to be made among the public records of the State of Oregon and of Harney County, Oregon, wherein said lands are located, to determine the names of the owners and the names of every other person interested in said lands, or any part thereof, and that all such persons insofar as can be ascertained at this time have been made parties to this proceeding;

VIII.

That the plaintiff has done and performed every act and thing required by law to be done by the

plaintiff as a condition precedent to the bringing and maintaining of this action.

Wherefore, the plaintiff prays that this Court take jurisdiction of the above-entitled proceeding and make and have entered herein such Judgments and Orders as may be necessary to vest in the plaintiff, the United States of America, the estate or interest in and to the lands above described, sought to be acquired by the plaintiff in this proceeding, and to determine the amount of just compensation to be paid by the plaintiff to whomsoever may be adjudged to be the owner or owners of said lands and entitled to such compensation, and to make distribution of such just compensation to the parties entitled thereto as expeditiously as possible.

/s/ HENRY L. HESS,

United States Attorney.

/s/ LINUS M. FULLER,

Special Assistant to the
United States Attorney.

/s/ BERT C. BOYLAN,

Special Assistant to the
United States Attorney.

Attorneys for Plaintiff. [3]

State of Oregon,

County of Multnomah—ss.

I, Linus M. Fuller, being first duly sworn, depose and say:

That I am a duly appointed, qualified and acting Special Assistant to the United States Attorney; that I am possessed of information from which

I have prepared the foregoing Complaint in Condemnation and the allegations therein contained are true as I verily believe.

/s/ LINUS M. FULLER.

Subscribed and sworn to before me this 22nd day of April, 1946.

[Seal] /s/ L. JEANETTE BEAR,
Notary Public for Oregon.

My Commission Expires: 9-23-47.

[Endorsed]: Filed Apr. 22, 1946. [4]

District Court of the United States
for the District of Oregon
Civil Action File No. 3124

UNITED STATES OF AMERICA,
Plaintiff,
vs.

BELLE HAYES and MARCELLUS B. HAYES,
Wife and Husband; and HARNEY COUNTY,
a Municipal Corporation and Political Subdi-
vision of the State of Oregon,
Defendants.

SUMMONS

To the above-named Defendants:

You are hereby summoned and required to appear and defend this action and to serve upon Henry L. Hess, U. S. Attorney; Bert C. Boylan and Linus

M. Fuller, Special Assistants to the U. S. Attorney, plaintiff's attorneys, whose address is U. S. Court House, Portland, Oregon, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal]

LOWELL MUNDORFF,

Clerk of Court.

By F. L. BUCK,

Chief Deputy Clerk.

Dated: April 22, 1946.

[Endorsed]: Filed Aug. 14, 1946. [5]

Return on Service of Writ

I hereby certify and return, that on the 22nd day of April, 1946, I received the within summons Returned unserved by order Attorney for Plaintiff.

Portland, Oregon, Aug. 13, 1946.

JACK R. CAUFIELD,

United States Marshal.

By MARTIN LAVELLE,

Deputy United States
Marshal.

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO FILE
AMENDED COMPLAINT IN CONDEM-
NATION

This matter coming on upon the motion of the plaintiff, the United States of America, by and through its attorneys of record herein, and It Appearing to the Court that leave should be granted to the plaintiff to file herein its Amended Complaint in Condemnation on the ground and for the reason set forth in plaintiff's Motion for Leave to File Amended Complaint in Condemnation; Now, Therefore, it is by the Court at this time Considered, Ordered and Adjudged that the plaintiff, the United States of America, be and it is hereby granted leave to file an Amended Complaint in Condemnation herein.

/s/ JAMES ALGER FEE,
District Judge.

Dated at Portland, Oregon, this 13th day of August, 1946.

[Endorsed]: Filed Aug. 13, 1946. [6]

[Title of District Court and Cause.]

AMENDED COMPLAINT IN
CONDEMNATION

Leave of Court having been obtained, the United States of America, by its attorneys, files this, its

Amended Complaint in Condemnation, and respectfully represents to this Honorable Court as follows:

I.

That this proceeding is instituted in accordance with and under the authority of the following Acts of Congress, to wit:

The Act of August 1, 1888 (25 Stat. 357—U.S.C. Title 40, Sec. 257);

The Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222—U.S.C. Title 16, Sec. 715) as supplemented and amended;

II.

That pursuant to and under the authority of the Acts of Congress above cited, the Assistant Secretary of the Department of the Interior (1) has selected the hereinafter described lands for acquisition by the United States of America for the purposes of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended, for acquisition within the Malheur National Wildlife Refuge of Oregon, and has determined that such lands are necessary and suitable for the conservation of migratory game birds; (2) has determined and is of the opinion that it is necessary and advantageous to the government of the United States to acquire by condemnation under judicial process the estate or interest hereinafter set forth in and to the lands so selected and hereinafter described for public use in connection with the administration of the Malheur National Wild-

life Refuge of Oregon; (3) has requested the Attorney General of the United States to institute this proceeding to acquire said estate in said lands, [7] in pursuance of which request the Attorney General has directed this proceeding to be instituted;

III.

That the estate taken by the plaintiff in this proceeding for said public use is the fee simple title to the lands hereinafter described, together with all accretions and relictions and all and singular the water rights and other rights, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining;

That the lands, the estate of which is sought, as above set out by this proceeding, are located in Harney County, Oregon, within this judicial district, and are more particularly described as follows, to wit:

Tract 17: Township Twenty-Five (25) South (north of Malheur Lake), Range Thirty-Two (32) East, Willamette Meridian: In section thirty-six (36), lots two (2), three (3), and four (4), Southeast quarter Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$), and Northeast quarter Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$); and in addition thereto the attached lands lying in the bed of Malheur Lake abutting upon the meander line of, and incident to, the riparian lands included in the above-described subdivisions, and other lands in the bed of said lake held by M. B. Hayes under adverse possession, all as par-

particularly described and adjudicated to said M. B. Hayes by Judgment and Decree, dated October 2, 1944, in the case of the United States vs. Henry Otley et al., Civil No. 1601, in the United States District Court for the District of Oregon; and Lake-bed Parcel 48; and

Bounded on the north, in part by land of F. A. Ruh and in part by land of the United States (tract 18); on the east by land of the United States (tract 18); on the south, in part by land of the United States (tract 41), in part by the W. E. Marshal Estate tract (61a) and the center line of Malheur Lake, and in part by the J. E. Graves tract (55a) and a wire fence; and on the west, in part by land of the United States (tract 16) and in part by the J. E. Graves tract (55); containing 1101.68 acres, be the same more or less;

The above-described tract of land is delineated on a map tracing designated M. B. Hayes Tract (17) bearing date of September 19, 1944, of record in the files of the Department of the Interior. A print from that map tracing is attached hereto marked "Exhibit A" and by reference made a part of this Amended Complaint;

V.

That the public use for which the estate above set out in the lands above described is sought is adequately to provide for an addition to and inclusion within the Malheur National Wildlife Refuge of Oregon, and for other uses incidental thereto under

the provisions of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended; [8]

VI.

That funds for the acquisition of said estate in said lands have been authorized and appropriated by the said Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended;

VII.

That plaintiff has caused diligent search to be made among the public records of the State of Oregon and of Harney County, Oregon, wherein said lands are located, to determine the names of the owners and the names of every other person interested in said lands, or any part thereof, and that all such persons, insofar as can be ascertained at this time, have been made parties to this proceeding;

VIII.

That the plaintiff has done and performed every act and thing required by law to be done by the plaintiff as a condition precedent to the bringing and maintaining of this action.

Wherefore, the plaintiff prays that this Court take jurisdiction of the above-entitled proceeding and make and have entered herein such Judgments and Orders as may be necessary to vest in the plaintiff, the United States of America, the estate or interest in and to the lands above described, sought to be acquired by the plaintiff in this proceeding, and to determine the amount of just com-

pensation to be paid by the plaintiff to whomsoever may be adjudged to be the owner or owners of said lands and entitled to such compensation, and to make distribution of such just compensation to the parties entitled thereto as expeditiously as possible.

/s/ HENRY L. HESS,

United States Attorney.

/s/ LINUS M. FULLER,

Special Assistant to the

United States Attorney.

/s/ BERT C. BOYLAN,

Special Assistant to the

United States Attorney. [9]

Attorneys for Plaintiff.

State of Oregon,

County of Multnomah—ss.

I, Linus M. Fuller, being first duly sworn, depose and say:

That I am a duly appointed, qualified and acting Special Assistant to the United States Attorney; that I am possessed of information from which I have prepared the foregoing Amended Complaint in Condemnation and the allegations therein contained are true as I verily believe.

/s/ LINUS M. FULLER.

Subscribed and sworn to before me this 13th day of August, 1946.

[Seal] /s/ L. JEANETTE BEAR,

Notary Public for Oregon.

My Commission Expires: 9-23-47.

[Endorsed]: Filed Aug. 13, 1946. [10]

District Court of the United States for the
District of Oregon
Civil Action File No. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BELLE HAYES and MARCELLUS B. HAYES,
wife and husband; and HARNEY COUNTY,
a municipal corporation and political subdivision of the State of Oregon,

Defendants.

SUMMONS

To the above named defendants:

You are hereby summoned and required to appear and defend this action and to serve upon Henry L. Hess, U. S. Attorney; Bert C. Boylan and Linus M. Fuller, Special Assistants to the U. S. Attorney, plaintiff's attorneys, whose address is U. S. Court House, Portland, Oregon, an answer to the amended complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal]

LOWELL MUNDORFF,

Clerk of Court.

By J. CASE,

Deputy Clerk.

Date: August 13, 1946.

[Endorsed]: Filed Jan. 2, 1948. [11]

United States of America,
District of Oregon—ss.

I, Jack R. Caufield, U. S. Marshal for Oregon, hereby certify that I served the within summons within the State of Oregon on the 28 day of Aug. 1946, on the within named Belle Hayes, at Burns, Oregon by delivering a copy thereof prepared and certified to by Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, together with a copy of the Amended complaint prepared and certified to by Linus M. Fuller, of attorneys for the Plaintiff, to Belle Hayes personally and in person within the State of Oregon.

Marshal's Docket 11688

Civil Docket 3124

JACK R. CAUFIELD,
United States Marshal.
FRANK L. MEYER,
Deputy U. S. Marshal.

United States of America,
District of Oregon—ss.

I, Jack R. Caufield, U. S. Marshal for Oregon, hereby certify that I served the within summons within the State of Oregon on the 28th day of Aug. 1946, on the within named Marcellas B. Hayes, at Burns, Oregon by delivering a copy thereof prepared and certified to by Lowell Mundorff, Clerk of the United States Court for the District of Oregon, together with a copy of the Amended Complaint prepared and certified to by Linus M. Fuller, of attorneys for the Plaintiff, to Marcellas B. Hayes

personally and in person within the State of Oregon.

Marshal's Docket 11688

Civil Docket 3124

JACK R. CAUFIELD,

United States Marshal.

FRANK L. MEYER,

Deputy U. S. Marshal.

United States of America,

District of Oregon—ss.

United States of America,

I, Jack R. Caufield, U. S. Marshal for Oregon, hereby certify that I served the within summons within the State of Oregon on the 28 day of Aug. 1946, on the within named Harney County by Leland Duncan Dist. Atty. at Burns, Oregon by delivering a copy thereof prepared and certified to by Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, together with a copy of the Amended complaint prepared and certified to by Linus M. Fuller, of attorneys for the Plaintiff, to Harney County by Leland Duncan Dist. Atty. personally and in person within the State of Oregon.

Marshal's Docket 11688

Civil Docket 3124

JACK R. CAUFIELD,

United States Marshal.

FRANK L. MEYER,

Deputy U. S. Marshal.

United States of America

District of Oregon—ss.

I, Jack R. Caufield, U. S. Marshal for Oregon, hereby certify that I served the within summons within the State of Oregon on the 28 day of Aug. 1946, on the within named Harney County by William A. Carroll, Co. Clerk at Burns, Oregon, by delivering a copy thereof prepared and certified to by Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, together with a copy of the Amended complaint and certified to by Linus M. Fuller, of attorneys for the Plaintiff, to Harney County by William A. Carroll personally and in person within the State of Oregon.

Marshal's Docket 11688

Civil Docket 3124

JACK R. CAUFIELD,

United States Marshal.

FRANK L. MEYER,

Deputy U. S. Marshal.

[Title of District Court and Cause.]

**ANSWER OF BELL HAYES AND
MARCELLUS B. HAYES**

Come now Bell Hayes and Marcellus B. Hayes, the above named defendants, and for answer to the amended complaint herein deny each and all allegation of said amended complaint, except as admitted and alleged in the further and separate answer of these defendants.

Further and separate answer of defendants Bell Hayes and Marcellus B. Hays.

For a further and separate answer to the amended complaint in this cause Bell Hayes and Marcellus B. Hayes allege as follows:

I.

That the defendants Bell Hayes and Marcellus B. Hayes are now and for the past forty years have been the sole and exclusive owners of the 1101.68 acres of land particularly described in plaintiff's amended complaint.

II.

That the said lands of these defendants border upon or lie within the lake bed of Malheur Lake. That said Malheur Lake is a low depression or area $16\frac{2}{3}$ miles long and from two to eight miles wide. That said area is usually covered with water in the spring of the year, but that due to drainage and evaporation the waters recede from the lands of these defendants during the growing season of each year, and said lands can be and are used each year for agricultural purposes. The soil of all of said lands is deep and extremely fertile [14] and when defendants' said lands are suitable for agricultural crops, large crops of grass, hay, grain and other crops, can be and are produced on said lands. The water condition of Malheur Lake varies from year to year, depending upon the variation of the spring run-off from rains and melting snows. From the year 1923 to the year 1941, grain and other agricultural crops could be, and were produced on a large part of the said lands of these defendants each year, except when such production was prevented by the

Plaintiff herein. The lake bed of Malheur Lake was completely dry in the summers of 1932 and 1934. From the year 1941 to date, most of the lands of these defendants, due to an excessive amount of water, have not been suitable for agricultural crops except grass and hay.

III.

That in addition to the agricultural values of defendants' said lands, said lands are valuable for the following reasons: Malheur Lake is and for many years has been a noted place for ducks, geese and other water fowl because such lands produce an abundance of foods for such water fowl. It has been estimated by government agents that more than one million ducks and other water fowl visit and feed upon said lake during the hunting season each year. That for many years the United States Government, through its bureaus and departments, has been acquiring, securing and reserving lands in Harney County, Oregon, to be used as, and which are used as a Bird Refuge; that no hunting is allowed on said Bird Refuge, and the public is excluded therefrom; that said Bird Refuge now consists of an area of more than One Hundred and Twenty-Five Thousand acres of land in and about Malheur Lake, Harney Lake and Blitzen Valley. That said Bird Refuge includes substantially all the lands in that part of the State of Oregon near, or served by water; that the boundary line of said Bird Refuge is more than 170 miles long, and with very few exceptions is now fenced, and numerous

trespass notices displayed thereon, and guards and wardens patrol said lands to prevent hunting thereon. [15]

IV.

That the said land of these defendants is not now and never has been a part of said or any bird refuge; That thousands of ducks, geese and other water fowl, each year use, and feed upon the said lands of the defendants during the hunting season, and by reason of the facts heretofore stated said lands of defendants are valuable for hunting purposes.

V.

The lands of said defendants have a further value for the production of muskrats. For many years the Malheur Lake region has been famous for the production of muskrat pelts. It is claimed by some residents of the area that the lands of the lake bed when properly handled, produce a greater revenue from muskrat pelts, than from any other purpose.

VI.

These defendants allege that the fair and reasonable value of the lands described in plaintiff's amended complaint for all purposes is not less than Fifty Dollars (\$50.00) per acre, or the sum of Fifty-Five Thousand and Eighty-Four Dollars (\$55,084.00).

Wherefore, these defendants pray that this court find and determine that these defendants are the sole and exclusive owners of the lands described in plaintiff's amended complaint; that the Court find

and determine that the value of said lands is Fifty-Five Thousand and Eighty-Four Dollars (\$55,084.00), and that these defendants have judgment against the plaintiff for said amount,

J. W. McCULLOCH,
EDWIN D. HICKS,
THOMAS H. TONGUE, III,
Attorneys for Defendants.

State of Oregon,
County of Multnomah—ss.

I, Edwin D. Hicks, being first duly sworn, depose and say that I am one of the attorneys for defendants in the above entitled cause; and that the foregoing answer is true, as I verily believe.

EDWIN D. HICKS,

Subscribed and sworn to before me this 2d day of October, 1946.

/s/ THOMAS H. TONGUE, III,

[Notarial Seal]

Notary Public for the State of Oregon.

My Commission Expires 8/25/48.

State of Oregon,
County of Multnomah—ss.

Due service of the within Answer is hereby accepted in Multnomah County, Oregon this 2 day of October, 19....., be receiving a copy thereof, duly certified to as such by....., of Attorneys for

BERT C. BOYLAN,
Attorney for Plaintiff.

In the District Court of the United States for the
District of Oregon

No. 3124

UNITED STATES OF AMERICA,

Petitioner,

vs.

1,101.68 ACRES, more or less, of land situate in
Harney County, Oregon,

Defendant.

In the matter of the acquisition by the United States of America of certain land situate, lying and being in connection with the Malheur National Wildlife Refuge of the Fish and Wildlife Service, United States Department of the Interior.

DECLARATION OF TAKING

I, C. Girard Davidson, Assistant Secretary of the Interior of the United States, acting in such capacity, do hereby make and cause to be filed this Declaration of Taking under and in accordance with the act of February 26, 1931 (46 Stat. 1421; 40 U. S. C. 258a), and declare that:

First: (a) the land hereinafter described is taken pursuant to and under authority of the Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222), as supplemented and amended.

(b) The said land has been selected by me for acquisition by the United States for use in connection with the Malheur National Wildlife Refuge, Fish

and Wildlife Service, Department of the Interior, and immediate control thereof is required. [18]

(c) In my opinion, it is necessary, advantageous, and in the interest of the United States that said land be acquired by judicial proceedings as authorized by the act of August 1, 1888 (25 Stat. 357; 40 U. S. C. 257, 258), as supplemented and amended.

(d) The land is necessary for use in carrying out the purposes of the Migratory Bird Conversation Act of February 18, 1929 (45 Stat. 1222), as supplemented and amended, including the establishment and administration of the Malheur National Wildlife Refuge.

Second: Pursuant to law, I have selected for acquisition for the purposes of the foregoing acts the following described land:

Tract No. 17

Township Twenty-Five (25) South (north of Malheur Lake), Range Thirty-Two (32) East, Willamette Meridian: In section thirty-six (36), lots two (2), three (3) and four (4), Southeast quarter Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$), and Northeast quarter Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$); and in addition thereto the attached lands lying in the bed of Malheur Lake abutting upon the meander line of, and incident to, the riparian lands included in the above-described subdivisions, and other lands in the bed of said lake held by M. B. Hayes under adverse possession (Lake-bed Parcel 48), all as particularly described and adjudicated to said M. B. Hayes by Judgment and

Decree, dated October 2, 1944, in the case of the United States vs. Henry Otley et al., Civil No. 1601, in the United States District Court for the District of Oregon; and

Bounded on the north, in part by land of F. A. Ruh and in part by land of the United States (tract 18); on the east by land of the United States (tract 18); on the south, in part by land of the United States (tract 41), in part by the W. E. Marshall Estate tract (61a) and the center line of Malheur Lake, and in part by the J. E. Graves tract (55a) and a wire fence; and on the west, in part by land of the United States (tract 16) and in part by the J. E. Graves tract (55); containing 1,101.68 acres, be the same more or less.

The above-described area, containing in the aggregate 1,101.68 acres, more or less, is delineated on a map tracing designated M. B. Hayes Tract (17) bearing date of September 19, 1944, and on file in the Department of [19] the Interior, and prints from this tracing are attached hereto and made part hereof. Said area is to be acquired together with all accretioned land, and all and singular water and riparian rights and other rights, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

Third: The estate taken for public use is the full fee simple title, reserving the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed

of Malheur Lake for a period of five (5) years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior.

Fourth: The sum estimated by me as just compensation for said land with all buildings and improvements thereon and all appurtenances thereunto belonging including any and all interest whatsoever is Sixteen Thousand Dollars (\$16,000.00), which sum is being deposited in the Registry of this Court for the use and benefit of the parties entitled thereto. I am of the opinion that the ultimate award for said land will probably be within the limits of allocations and allotments made and provided for the purchase of said land.

In Witness Whereof, I have signed this Declaration of Taking and caused the seal of the Department of the Interior to be hereto affixed on this 14 day of January A.D., 1947, in the city of Washington District of Columbia.

[Seal] /s/ C. GIRARD DAVIDSON,
Assistant Secretary of the Interior of the United
States of America.

[Endorsed]: Filed February 11, 1947. [20]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO FILE SECOND AMENDED COMPLAINT IN CONDEMNATION

This matter coming on for consideration on the motion of the plaintiff, through its attorneys of

record, and It Appearing proper and necessary that the plaintiff be granted leave to file herein its Second Amended Complaint in Condemnation for the purpose of alleging the filing of a Declaration of Taking and the deposit of the estimated just compensation for the taking of the lands described in the amended complaint in condemnation; Now, Therefore, it is Ordered that the plaintiff be and it is hereby granted leave to file its Second Amended Complaint in Condemnation.

/s/ CLAUDE McCOLLOCH,
District Judge.

Dated at Portland, Oregon, this 13th day of February, 1947.

[Endorsed]: Filed February 13, 1947. [21]

[Title of District Court and Cause.]

**SECOND AMENDED COMPLAINT
IN CONDEMNATION**

Leave of Court having been obtained, the plaintiff, the United States of America, by its attorneys, files this Second Amended Complaint in Condemnation and respectfully represents to this Honorable Court as follows:

I.

That this proceeding is instituted in accordance with and under the authority of the following Acts of Congress, to wit:

The Act of August 1, 1888 (25 Stat. 357—

U.S.C. Title 40, Sec. 257, 258), as supplemented and amended;

The Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222—U.S.C. Title 16, Sec. 715) as supplemented and amended;

The Act of February 26, 1931 (46 Stat. 1421—40 U.S.C. Sec. 258a);

II.

That pursuant to and under the authority of the Acts of Congress above cited, the Assistant Secretary of the Department of the Interior of the United States (1) has selected the hereinafter described lands for acquisition by the United States of America for the purposes of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended, for inclusion within the Malheur National Wildlife Refuge of Oregon, and has determined that such lands are necessary and suitable for the conservation of migratory game birds; (2) has determined and is of the opinion that it is necessary, advantageous and in the interest of the United States to acquire by condemnation under judicial process the estate or interest hereinafter set forth in and to the lands so selected and hereinafter described for public use in connection with the administration of the Malheur National Wildlife Refuge of Oregon; (3) has requested the Attorney [22] General of the United States to institute this proceeding to acquire said estate in said lands, in pursuance of which request the Attorney General has directed this proceeding to be instituted;

III.

That the estate taken by the plaintiff in this proceeding for said public use is the full fee simple title to the lands hereinafter described, reserving the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior;

IV.

That the lands, the estate of which is sought in this proceeding, as above set out, are located in Harney County, Oregon, within this judicial district, and are more particularly described as follows, to wit:

Tract No. 17: Township Twenty-Five (25) South (north of Malheur Lake), Range Thirty-Two (32) East, Willamette Meridian: In section thirty-six (36), lots two (2), three (3) and four (4), Southeast quarter Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$), and Northeast quarter Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$); and in addition thereto the attached lands lying in the bed of Malheur Lake abutting upon the meander line of, and incident to, the riparian lands included in the above-described subdivisions, and other lands in the bed of said lake held by M. B. Hayes under adverse possession (Lake-bed Parcel 48), all as particularly described and

adjudicated to said M. B. Hayes by Judgment and Decree, dated October 2, 1944, in the case of the United States vs. Henry Otley et al, Civil No. 1601, in the United States District Court for the District of Oregon; and

Bounded on the north, in part by land of F. A. Ruh and in part by land of the United States (tract 18); on the east by land of the United States (tract 18); on the south, in part by land of the United States (tract 41), in part by the W. E. Marshall Estate tract (61a) and the center line of Malheur Lake, and in part by the J. E. Graves tract (55a) and a wire fence; and on the west, in part by land of the United States (tract 16) and in part by the J. E. Graves tract (55); containing 1,101.68 acres, be the same more or less.

The above-described tract of land is delineated on a map tracing designated M. B. Hayes Tract (17) bearing date of September 19, 1944, and on file in the Department of the Interior. A print from that map tracing is attached hereto marked "Exhibit A" and by reference made a part of this Second Amended Complaint;

V.

That the public use for which the estate above set out in the lands above described is sought is adequately to provide for an addition to and inclusion within the Malheur National Wildlife Refuge of Oregon and for other uses incidental [23] thereto

under the provisions of the Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended;

VI.

That funds for the acquisition of said estate in said lands have been authorized and appropriated by the said Migratory Bird Conservation Act of February 18, 1929, above cited, as supplemented and amended;

VII.

That plaintiff has caused diligent search to be made among the public records of the State of Oregon and of Harney County, Oregon, wherein said lands are located, to determine the names of the owners and the names of every other person interested in said lands or any part thereof, and that all such persons insofar as can be ascertained at this time have been made parties to this proceeding;

VIII.

That the plaintiff has done and performed every act and thing required by law to be done by the plaintiff as a condition precedent to the bringing and maintaining of this action;

IX.

That on the 11th day of February, 1947 a Declaration of Taking was filed in this Court for the taking of the estate above set out in the lands above-described, that in said Declaration of Taking the Assistant Secretary of the Department of the Interior estimated the sum of \$16,000.00 to be just

compensation for the taking of said estate in said lands and that said sum of \$16,000.00 was on the said 11th day of February, 1947 deposited in the Registry of this Court under the provisions of the Declaration of Taking Act of February 26, 1931, heretofore cited.

Wherefore, plaintiff prays:

(a) That this Court make and enter an Order reciting the filing of the Declaration of Taking and the Second Amended Complaint in Condemnation herein and the payment into the Registry of this Court of the estimated just compensation for the taking of the estate hereinbefore set out in the lands hereinbefore described, and the effect thereof as to the vesting of the title thereto in the United States of America; [24]

(b) That this Court take jurisdiction of this cause and make and have entered all such further Orders, Judgments and Decrees as may be necessary to determine the ownership of the hereinbefore described lands and the persons entitled to receive such just compensation, and to fix the amount of such just compensation to be paid by the plaintiff to whomsoever may be adjudged to be entitled thereto, and to make and have entered herein all such further Orders, Judgments and Decrees as may be necessary to vest in the United States of America the title to the estate or interest hereinbefore set out in the lands hereinbefore described, and to make just distribution of the estimated and final

award among those entitled thereto as expeditiously as possible.

/s/ HENRY L. HESS,

United States Attorney

/s/ LINUS M. FULLER,

Special Assistant to the

United States Attorney.

/s/ BERT C. BOYLAN,

Special Assistant to the

United States Attorney.

Attorneys for Plaintiff, P. O. Address: 507 U. S.
Courthouse, Portland 5, Oregon.

State of Oregon,

County of Multnomah—ss.

I, Linus M. Fuller, being first duly sworn, depose and say:

That I am a duly appointed, qualified and acting Special Assistant to the United States Attorney; that I am possessed of information from which I have prepared the foregoing Second Amended Complaint in Condemnation and the allegations therein contained are true as I verily believe.

/s/ LINUS M. FULLER.

Subscribed and sworn to before me this 13th day of February, 1947.

[Seal] /s/ L. JEANETTE BEAR,

Notary Public for Oregon.

My Commission Expires: 9-23-47.

[Exhibit A is identical with Government's Exhibit No. 1, except for colored portions thereof, set forth at page 87]

[Endorsed]: Filed February 13, 1947. [25]

District Court of the United States
for the District of Oregon

Civil Action File No. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARCELLUS B. HAYES and MARY I. HAYES,
also known as BELL HAYES, husband and
wife; ADELBERT M. HAYES, single; and
HARNEY COUNTY, a municipal corporation
and political subdivision of the State of Oregon,
Defendants.

SUMMONS

To the above named Defendants Adelbert M. Hayes
and Harney County, Oregon.

You are hereby summoned and required to appear
and defend this action and to serve upon Henry L.
Hess, U. S. Attorney; Linus M. Fuller and Bert C.
Boylan, Special Assistants to the U. S. Attorney,
plaintiff's attorneys, whose address is U. S. Court
House, Portland, Oregon, an answer to the second
amended complaint which is herewith served upon
you, within twenty days after service of this sum-
mons upon you, exclusive of the day of service. If
you fail to do so, judgment by default will be taken

against you for the relief demanded in the complaint.

[Seal] LOWELL MUNDORFF,
Clerk of Court.

By /s/ F. L. BUCK,
Chief Deputy Clerk.

Date: February 15, 1947.

[Endorsed]: Filed January 2, 1948. [27]

United States of America,
District of Oregon—ss.

I, Jack R. Caufield, U. S. Marshal for Oregon, hereby certify that I served the within summons within the State of Oregon on the 20th day of March, 1947, on the within named Adelbert M. Hayes at Burns, Oregon by delivering a copy thereof prepared and certified to by Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, together with a copy of the 2nd amended complaint prepared and certified to by Bert C. Boylan, of attorneys for the Plaintiff, to Adelbert M. Hayes personally and in person within the State of Oregon.

Marshal's Docket 11688.

Civil Docket 3124.

JACK R. CAUFIELD,
United States Marshal.

LEO McLAIN,
Deputy U. S. Marshal.

[Title of District Court and Cause.]

**JUDGMENT ON DECLARATION OF TAKING
AND ORDER GRANTING IMMEDIATE
POSSESSION**

This matter coming on for consideration on the motion of the plaintiff, the United States of America, by and through its attorneys of record, for a Judgment on the Declaration of Taking filed in the above-entitled cause on the 11th day of February, 1947, and for an Order Granting Possession under said Declaration of Taking of the lands therein described and hereinafter described, and a hearing having been had in Open Court on such motion and evidence having been introduced before the Court and the Court having considered the Declaration of Taking and the Second Amended Complaint in Condemnation and the evidence submitted, finds: First: That the United States of America is entitled to acquire the lands hereinafter described for the uses and purposes set forth in said Declaration of Taking and in said Second Amended Complaint in Condemnation; Second: That this proceeding was instituted and said Complaint in Condemnation and said Declaration of Taking were filed herein at the request of the Assistant Secretary of the Department of the Interior of the United States, the authority empowered by law to acquire the lands described in said Second Amended Complaint in Condemnation and Declaration of Taking and hereinafter described, and at the direction of the Attorney General of the United States, the person authorized by law to direct the institution of such pro-

ceedings; Third: That the said Declaration of Taking was filed herein on the 11th day of February, 1947 and simultaneously therewith the sum of \$16,000.00 was deposited in the Registry of this Court in this cause as the estimated just compensation to be paid for the taking of the full fee simple title to the lands hereinafter described, reserving the right to use in livestock [28] ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior; and further, said Declaration of Taking contains (1) a statement of the authority under which and the public use for which said estate in said lands is taken, (2) a description of the lands taken sufficient for the identification thereof, (3) a statement of the estate taken in said lands for said public use, (4) a plan showing the lands taken, (5) a statement of the sum of money estimated by the Assistant Secretary of the Department of the Interior as just compensation for the taking of said estate in said lands, and (6) a statement by the Assistant Secretary of the Department of the Interior that in his opinion the ultimate award to be paid for the taking of said estate in said lands will probably be within any limits prescribed by law to be paid as the price therefor; Now, Therefore, it is hereby Ordered, Adjudged and Decreed: I. That the full fee simple title, reserving the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the sur-

veyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior, in and to the lands described in the Second Amended Complaint in Condemnation and Declaration of Taking on file herein, said lands being hereinafter described, became and was vested in the United States of America on the 11th day of February, 1947, the date of the filing of said Declaration of Taking herein and the depositing into the Registry of this Court in this cause of the amount of the estimated just compensation, free and discharged of all liens and claims of every kind whatsoever; II. That on said date, February 11, 1947, the right to receive said just compensation for the taking of the said estate in said lands vested in the persons entitled thereto and that the amount of said just compensation shall be ascertained and warded in this proceeding as established by Judgment herein pursuant to law; III. That the lands in and to which the estate hereinabove set forth is taken herein are located in Harney County, Oregon, within this judicial district, and more particularly described as follows, to wit: [29]

Tract No. 17: Township Twenty-five (25) South (north of Malheur Lake, Range Thirty-two (32) East, Willamette Meridian: In section thirty-six (36), lots two (2), three (3) and four (4), Southeast quarter Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$), and Northeast quarter Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$); and in addition thereto the attached lands lying in the bed of Malheur Lake abutting upon the meander line

of, and incident to, the riparian lands included in the above-described subdivisions, and other lands in the bed of said lake held by M. B. Hayes under adverse possession (Lake-bed Parcel 48), all as particularly described and adjudicated to said M. B. Hayes by Judgment and Decree, dated October 2, 1944, in the case of the United States vs. Henry Otley et al., Civil No. 1601, in the United States District Court for the District of Oregon; and

Bounded on the north, in part by land of F. A. Ruh and in part by land of the United States (tract 18); on the east by land of the United States (tract 18); on the south, in part by land of the United States (tract 41), in part by the W. E. Marshall Estate tract (61a) and the center line of Malheur Lake, and in part by the J. E. Graves tract (55a) and a wire fence; and on the west, in part by land of the United States (tract 16) and in part by the J. E. Graves tract (55); containing 1,101.68 acres, be the same more or less;

IV. That possession of the above-described lands under said Declaration of Taking be and is hereby granted to the United States of America as of the date of this Judgment.

/s/ CLAUDE McCOLLOCH,
District Judge.

Dated at Portland, Oregon, this 26th day of February, 1947.

Entered in docket Feb. 26, 1947.

[Endorsed]: Filed February 26, 1947. [30]

[Title of District Court and Cause.]

REPLY TO ANSWER OF DEFENDANTS
BELL HAYES AND MARCELLUS B. HAYES

Comes now the plaintiff, United States of America, by its attorneys of record and by way of reply to the Further and Separate Answer of the defendants Bell Hayes and Marcellus B. Hayes on file herein admits, denies and alleges as follows, to wit:

I.

Plaintiff alleges that it does not have sufficient information to form a belief as to the truth of the allegations set out in Paragraph I of said Further and Separate Answer and therefore neither admits nor denies the same.

II.

Plaintiff admits the geographical and historical data contained in Paragraph II of said Further and Separate Answer, but denies that said lands under condemnation are suitable for or adapted to the growing of agricultural crops and have produced such crops other than forage and wild hay.

III.

Plaintiff admits the allegations of Paragraph III of said Further and Separate Answer, but denies that the public is excluded from said lands.

IV.

Plaintiff admits that every year large numbers of ducks, geese and other water fowl use and feed upon the lands contained within the Malheur Na-

tional Wildlife Refuge, including the lands under condemnation herein but denies each and every other allegation contained in Paragraph IV of said Further and Separate Answer and particularly denies that the lands of the defendants under condemnation [31] herein are valuable for hunting purposes for the reason that the said lands under condemnation herein are within the Malheur National Wildlife Refuge and have been in such Refuge for many years past and that the hunting of migratory wild fowl is unlawful within such Refuge.

V.

Plaintiff denies the allegations of Paragraph V of said Further and Separate Answer.

VI.

Plaintiff denies the allegations of Paragraph VI of the Further and Separate Answer and particularly denies that the lands under condemnation herein are worth the sum of \$50.00 per acre or the total sum of \$55,084.00, or any other sum in excess of \$16,000.00.

And for its Further and Separate Reply to the Further and Separate Answer of the defendants Bell Hayes and Marcellus B. Hayes, the plaintiff alleges as follows, to wit:

I.

That the said answering defendants and each of them are estopped and ought not be admitted to say that at the time of the taking the fair market value of the lands under condemnation was the sum of

\$55,084.00 or any other sum other than the sum of \$16,000.00 for the reason that on the 9th day of October, 1946, for a valuable consideration, the said defendants and each of them, together with the defendant, Adelbert M. Hayes, as owners of said lands made, executed and delivered to the plaintiff, acting through the Department of the Interior, Fish and Wildlife Service, their certain offer or option in writing and subscribed and acknowledged by each of said defendants and designated "Agreement for Acquisition of Lands"; that said option by its terms provided that the said defendants as owners agreed to sell to the plaintiff the 1101.68 acres of land under condemnation herein at and for the agreed and stipulated price of \$16,000.00, reserving to themselves the right to use in livestock ranching operations such as harvesting of hay and feeding and grazing of stock the surveyed land and Special [32] Master Tract 48 in the bed of Malheur Lake for a period of five years from the date of said agreement in accordance with rules and regulations of the Secretary of the Interior; that the said option by its terms provided further that title to the said lands will be acquired by the United States by judicial proceedings to procure a safe title and that the compensation to be claimed by the said owners and the award to be made and paid for said lands in said proceedings shall be upon the basis of the purchase price and reservation provided in said option; that the said option by its terms further provided that the said defendants thereby granted to the plaintiff the option and right to enter into said agreement

for the acquisition of said land within three months from the execution thereof by the vendors and to institute judicial proceedings for the acquisition of the lands as therein provided.

II.

That pursuant to the terms of said option and within three months from the date of the execution thereof by the vendors, the plaintiff, acting through the Secretary of the Interior by the Acting Director, Fish and Wildlife Service, did, on the 16th day of December, 1946, accept the said option and executed the said Agreement for Acquisition of Lands, and did, on said day by the said Acting Director, notify the vendors of said acceptance by mailing a notice of said acceptance to Mr. Marcellus B. Hayes, Box 368, Burns, Oregon, and to Mr. Adelbert M. Hayes, Box 368, Burns, Oregon; a copy of said Agreement for Acquisition of Lands, including the acceptance thereof by the plaintiff, is attached hereto, marked Exhibit A, and by reference made a part of this Further and Separate Reply.

III.

That pursuant to the terms of said Agreement for Acquisition of Lands, and relying upon the acts and agreements of said defendants as set forth in said Agreement for Acquisition of Lands, plaintiff, on the 11th day of February 1947 filed in this proceeding for the condemnation of said lands its Declaration of Taking of said lands, reserving to said defendants the right to use in livestock ranching operations,

such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years from October 1946 in accordance with rules and regulations [33] of the Secretary of the Interior, and simultaneously therewith deposited in the Registry of this Court the sum of \$16,000.00, the purchase price as set out in said Agreement as just compensation for the taking of said lands, subject to said reservation, under the provisions of the Declaration of Taking Act of Congress, for the use and benefit of the persons entitled thereto.

Wherefore plaintiff respectfully moves the Court for a judgment herein in accordance with the prayer of the plaintiff in its Second Amended Complaint in Condemnation herein and for an Order Fixing the Value of the lands under condemnation herein and the just compensation to be paid for the taking thereof in the sum of \$16,000.00 in accordance with the said Agreement for Acquisition of Lands.

HENRY L. HESS,

United States Attorney.

/s/ LINUS M. FULLER,

Special Assistant to United
States Atty.

/s/ BERT C. BOYLAN,

Special Assistant to United
States Atty.

Attorneys for Plaintiff, P. O. Address: 507 U. S.
Court House, Portland 5, Oregon.

State of Oregon,
County of Multnomah—ss.

I, Linus M. Fuller, being first duly sworn, depose and say:

That I am a duly appointed, qualified and acting Special Assistant to the United States Attorney; that I am possessed of information from which I have prepared the foregoing Reply and the allegations therein contained are true as I verily believe.

/s/ LINUS M. FULLER.

Subscribed and sworn to before me this 11th day of September, 1947.

[Seal] /s/ BERT C. BOYLAN,

Notary Public for State of
Oregon.

My Commission Expires May 2, 1949.

State of Oregon,
County of Multnomah—ss.

Due service of the within Reply is hereby accepted in Multnomah County this 11th day of September, 1947, by receiving a copy thereof duly certified to as such by Linus M. Fuller, of Attorneys for Plaintiff.

/s/ EDWIN D. HICKS,
of Counsel.

[Endorsed]: Filed September 11, 1947. [34]

EXHIBIT A

United States Department of the Interior
Fish and Wildlife ServiceState Oregon,
County Harney

Agreement for Acquisition of Lands

Unit Name: Malheur National Wildlife Refuge.

Tract Name: M. B. Hayes.

Tract Number: 17.

Offer Dated.....October 9, 1946

Offer Expires.....January 9, 1947

M.B.C.C. Approved.....Sept. 29, 1944

Offer Accepted.....Dec. 16, 1946

Acreage1101.68

Price per tract.....\$16,000.00 with reservation

Location: Willamette Meridian, T. 25 S., R. 32 E.,
N. M. L.

Easements, Reservations, and Exceptions: Reserve the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five (5) years from the date hereof in accordance with rules and regulations of the Secretary of the Interior.

/s/ A. M. H.

/s/ M. B. H.

/s/ M. T. H.

United States Department of the Interior
Office of the Secretary

Agreement for the Acquisition of Lands

This Agreement, made and entered into this 9th day of October one thousand nine hundred and forty-six by and between Marcellus B. Hayes, Mary I. Hayes, also known as Bell Hayes, and Adelbert M. Hayes, a divorced person, all of Burns, Oregon, Box 368, hereinafter styled the vendors, for themselves, their heirs, executors, administrators, successors, and assigns, and the United States of America.

Witnesseth:

In consideration of One Dollar (\$1.00) in hand paid by the United States, the receipt of which is hereby acknowledged, and in consideration of the covenants and agreements herein recited, the vendors agree to the acquisition by the United States upon the terms and conditions hereinafter set forth, of the lands, tenements, and hereditaments, together with all the rights, easements, and appurtenances thereunto and situate and lying in Harney Basin north of Malheur Lake, in the County of Harney, State of Oregon, containing 1101.68 acres, more or less, and particularly described as follows:

Willamette Meridian:

T. 25 S., R. 32E., N.M.L.:

Sec. 36, Lots 2, 3, and 4, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$; and in addition thereto the attached lands lying in the bed of Malheur Lake abutting upon the meander line of, and incident to, the

•

riparian lands included in the above described subdivisions; and other lands in the bed of said lake held by M. B. Hayes under adverse possession; all as particularly described and adjudicated to said M. B. Hayes by Judgment and Decree, dated October 2, 1944, in the case of the United States vs. Henry Otley et al, Civil No. 1601, in the United States District Court, for the District of Oregon.

The above described lands in one tract is delineated on map tracing designated: M. B. Hayes Tract (17)—bearing date of September 19, 1944, of record in the files of the Department of the Interior. Prints from this map tracing is attached hereto, and, for the purpose of identification, made a part hereof.

The said lands are subject to the following easements, none.

1. The price at which acquisition of the vendors' interest in said lands will be made by the United States shall be at the rate of \$16,000.00 for the tract for the fee simple title thereto*, subject to existing easements for public roads and public utilities, and if the vendors' interest in said lands is less than a fee, then in that event the rate per acre to be paid

*Subject to the reservation of the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five (5) years from the date hereof in accordance with rules and regulations of the Secretary of the Interior and

/s/ A.M.H.

/s/ M.B.H.

/s/ M.I.H.

•

vendors for said fractional interest shall bear the same ratio to the rate stated herein for the fee as the vendors' fractional interest bears to the fee in said lands.

2. At the date of this instrument the title to the said lands is clear and free and unencumbered except as here noted: none.

3. The vendors will not do or suffer to be done any act whereby their title or any part of the realty may be diminished or encumbered except by mutual consent of the contracting parties or their duly authorized representatives and, during the life of this instrument, will take all necessary precautions to protect the property from damage by fire, trespass, or other causes.

4. During the period covered by this instrument officers and accredited agents of the United States shall have at all proper times the unrestricted right and privilege to enter upon said lands for all proper and lawful purposes, including examination of said lands and the resources upon it.

5. It is understood that title to the said lands will be acquired by the United States by judicial proceedings to procure a safe title and that the compensation to be claimed by the owners and the award to be made and paid for said lands in said proceedings shall be upon the basis of the purchase price herein provided.

6. The acreage contained in the land herein agreed to be conveyed and acquired shall be ascer-

tained by a survey to be made by and at the expense of the United States according to the horizontal measurements by the United States in the survey of public lands or by recourse to the records of the General Land Office or by both, and the award and payment therefor shall be made on the basis of such survey.

7. Any abstract of the title to the property herein described will be obtained by the United States without cost to the vendors.

8. While this agreement primarily is intended to be made by the United States by and through the Secretary of the Interior, yet it may be entered into by and through any other officer or agency of the United States authorized thereunto, and the optional rights hereby granted to enter into this agreement may be availed of by the United States through any other officer or agency authorized to purchase said lands but the vendors' interest in this agreement shall not be assigned in whole or in part.

It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, and either before or after he has qualified, and during his continuance in office shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation

or company (Section 3741, Revised Statutes, and Sections 114, 116, Act of March 4, 1909).

9. By this agreement or contract the vendors hereby agree to divest themselves of all right, title, or interest to said land including any claims, or compensation for damage or right they might have under and by virtue of what is known as the "Tucker Act." [39]

In Witness Whereof, the vendors have hereunto signed their names and affixed their respective seals, on the day first above written, with the understanding that this Agreement for Acquisition cannot be executed by the Secretary of the Interior until after it is reported to him for his consideration, and therefore the vendors for and in consideration of the \$1.00 hereinabove acknowledged as received, have and do hereby grant unto the United States of America, by and through the Secretary of the Interior or any other officer or agency of the United States authorized to acquire said lands, the option and right to enter into this Agreement for Acquisition within three months from the execution thereof by the vendors, and months within which to institute judicial proceedings for the acquisition of the lands as herein provided.

/s/ MARCELLUS B. HAYES

/s/ MARY I. HAYES

/s/ ADELBERT M. HAYES

Witness as to signature of the vendors:

/s/ ANNA M. GUNTHER,

The acquisition of the land herein described at the price and under the conditions herein stated having been approved by the Migratory Bird Conservation Commission at a meeting on Sept. 29, 1944, the Secretary of the Interior, acting by and through his agent, the Director of the Fish and Wildlife Service, has executed this agreement on behalf of the United States of America, on this 16th day of Dec., 1946.

THE UNITED STATES OF
AMERICA,

J. A. KRUG,

Secretary of the Interior.

By /s/ O. H. JOHNSON,

Acting Director, Fish and
Wildlife Service.

Acknowledgement for Individuals

State of Oregon,

County of Harney—ss.

Be it remembered that on this 9th day of October, 1946 before the subscriber, a Notary Public in and for the County of Harney, State of Oregon, appeared Marcellus B. Hayes and Mary I. Hayes, his wife and Adelbert M. Hayes, a divorced person described in and who executed the hereto annexed instrument of writing, dated October 9th, 1946, and acknowledged that they executed the said instrument freely and voluntarily for the uses and purposes therein stated; and I further certify that the

said persons are known to me to be the persons described in and who executed the said instrument.

Given under my hand and official seal.

[Seal] /s/ ANNA M. GUNTHER,

Notary Public for Oregon.

My commission expires June 20, 1950.

[Attached map of M. B. Hayes Tract is identical with Government's Exhibit No. 1, except for colored portions thereof, set forth on page 87] [41]

[Title of District Court and Cause.]

MOTION TO STRIKE FURTHER AND SEPARATE REPLY OF THE UNITED STATES TO THE FURTHER AND SEPARATE ANSWER OF THE DEFENDANTS HEREINAFTER NAMED

Comes now the Defendants Marcellus B. Hayes and Mary I. Hayes, also known as Belle Hayes, husband wife; Adelbert M. Hayes, single, and move that the further and separate reply of the United States to the further and separate answer of the within named Defendants, be stricken for the reasons following:

I.

That said further and separate reply is not timely filed.

II.

That said further and separate reply does not

state facts sufficient to warrant the relief prayed for thereunder or any relief.

III.

That said further and separate reply seeks by its terms to subvert and prevent this Court from exercising its constitutional and statutory duty of ascertaining in the manner prescribed by law the amount of just compensation to be paid for the taking of the lands under condemnation herein.

IV.

Said further and separate reply fails to state facts save to constitute an estoppel against these defendants as particularly prayed for therein.

/s/ J. W. McCULLOCH,

/s/ EDWIN D. HICKS,

of Attorney for these

answering Defendants.

Service accepted this 19th day of September, 1947.

/s/ LINUS M. FULLER,

of Attorneys for Plaintiff.

[Endorsed]: Filed September 19, 1947. [43]

In the District Court of the United States
for the District of Oregon

Civil No. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARCELLUS B. HAYES and MARY I. HAYES,
also known as BELL HAYES, husband and
wife; ADELBERT M. HAYES, single; and
HARNEY COUNTY, a municipal corporation
and political subdivision of the State of Oregon,
Defendants.

VERDICT OF THE JURY

We, the Jury, duly impaneled and sworn to try the above-entitled cause, find that the full, fair market value of the full fee simple title to the lands described in the Second Amended Complaint in Condemnation and designated as Tract No. 17, reserving the right to use in livestock ranching operations, such as harvesting of hay, and the feeding and grazing of stock, the surveyed land and Special Master Tract No. 48 in the bed of Malheur Lake, for a period of five years from October 9, 1946 in accordance with the rules and regulations of the Secretary of the Interior, and the just compensation to be paid for the taking of said lands, subject to said reservation, is the sum of \$36,500.00.

Dated at Burns, Oregon, this 25th day of September, 1947.

/s/ MURRAY MORTON,
Foreman.

[Endorsed]: Filed September 25, 1947. [44]

In the District Court of the United States
for the District of Oregon

Civil No. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARCELLUS B. HAYES and MARY I. HAYES,
also known as BELL HAYES, husband and
wife; ADELBERT M. HAYES, single; and
HARNEY COUNTY, a municipal corporation
and political subdivision of the State of Oregon,
Defendants.

JUDGMENT ON VERDICT

This cause coming on regularly for trial on the 19th day of September, 1947, plaintiff appearing by Bert C. Boylan and Linus M. Fuller, Special Assistants to the United States Attorney for the District of Oregon, and the defendants Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife, appearing by J. W. McCulloch and Edwin D. Hicks, their attorneys; a jury was there-

upon duly impaneled and sworn to try the issues in said cause, the defendants assumed the burden of proof; a view of the premises under condemnation by the jury in the custody of the United States Marshal was had by order of Court on the 24th day of September, 1947, and on the 25th day of September, 1947, opening statements were made to the jury by counsel, witnesses were sworn and testimony taken; argument of counsel was had and instructions as to the law were given by the Court, whereupon, on the 25th day of September, 1947, the jury did retire for deliberation and after deliberating, and on the 25th day of September, 1947, returned into Court a verdict in words and figures as follows, to wit:

In the District Court of the United States
for the District of Oregon
Civil No. 3124

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARCELLUS B. HAYES and MARY I.
HAYES, also known as BELL HAYES,
husband and wife; ADELBERT M.
HAYES, single; and HARNEY COUN-
TY, a municipal corporation and political
subdivision of the State of Oregon.

Defendants.

VERDICT OF THE JURY

We, the Jury, duly impaneled and sworn to try the above-entitled cause, find that the full,

fair market value of the full fee simple title to the lands described in the Second Amended Complaint in Condemnation and designated as Tract No. 17, reserving the right to use in livestock ranching operations, such as harvesting of hay, and the feeding and grazing of stock, the surveyed land and Special Master Tract No. 48 in the bed of Malheur Lake, for a period of five years from October 9, 1946 in accordance with the rules and regulations of the Secretary of the Interior, and the just compensation to be paid for the taking of said lands, subject to said reservation, is the sum of \$36,500.00.

Dated at Burns, Oregon, this 25th day of September, 1947.

/s/ MURRAY MORTON,
Foreman.

Now, Therefore, by virtue of the law and by reason of the premises and the verdict above set out, It Is Hereby Ordered, Adjudged and Decreed that the full, fair market value of the fee simple title to the lands described in the second amended complaint in condemnation and designated as Tract No. 17, reserving the right to use in livestock ranching operations such as harvesting of hay and the feeding and grazing of stock, the surveyed land and Special Master Tract No. 48 in the bed of Malheur Lake for a period of five years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior, is the sum of \$36,500.00.

Dated at Burns, Oregon, this 25th day of September, 1947.

/s/ JAMES ALGER FEE,
Judge.

[Endorsed]: Filed October 2, 1947.

Entered in Docket October 2, 1947. [46]

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT
OF THE JURY

Comes now the plaintiff, the United States of America by its attorneys of record, and respectfully moves the Court for an order herein setting aside the Judgment on the Verdict and the verdict of the jury returned herein and granting a new trial of this cause on the ground and for the reason (1) That the said verdict is excessive; (2) That the said verdict is not supported by any competent evidence; (3) That the said verdict is the result of passion, prejudice and caprice on the part of the jury and is not in any reasonable conformity with the competent evidence produced before said jury nor with the instructions of the Court as to the law.

/s/ BERT C. BOYLAN,

Special Assistant to the
United States Attorney.

Due and legal service of the foregoing Motion is acknowledged and accepted this 3rd day of October, 1947.

/s/ EDWIN D. HICKS,
By MARIETA A. KELLUM,
of Attorneys for Defendants.

[Endorsed]: Filed October 3, 1947. [47]

[Title of District Court and Cause.]

ORDER

Now at this day this cause coming on to be heard upon the Motion of the United States of America, plaintiff herein, for an order setting aside the verdict of the jury and the judgment on the verdict entered in the above-entitled cause on the 25th day of September, 1947, and granting a new trial therein, plaintiff appearing by Bert C. Boylan and Linus M. Fuller, Special Assistants to the United States Attorney, and the defendants appearing by Edwin D. Hicks of counsel for the defendants, and the motion having been duly presented by oral argument and the Court being fully advised in the premises, It Is Hereby Ordered and Adjudged that the verdict of the jury and the judgment on the verdict entered herein on the 25th day of September, 1947, be and the same are hereby set aside; And It Is Hereby Further Ordered and Adjudged on the motion of the Court that the Declaration of Taking filed in this cause on the 11th day of Febru-

ary, 1947, be and the same is hereby stricken from the files in this cause and that the judgment on the Declaration of Taking and the Order granting immediate possession be and the same is hereby vacated; And It Is Further Ordered and Adjudged that this cause be and same is hereby dismissed.

/s/ JAMES ALGER FEE,

District Judge.

Dated at Portland, Oregon, October 20, 1947.

[Endorsed]: Filed October 23, 1947. [48]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that part of the Order and Judgment entered October 20, 1947, and filed October 23, 1947, as follows:

“And It Is Hereby Further Ordered and Adjudged on the motion of the Court that the Declaration of Taking filed in this cause on the 11th day of February, 1947, be and the same is hereby stricken from the files in this cause and that the judgment on the Declaration of Taking and the Order granting immediate possession be and the same is hereby vacated; and It Is Further Ordered and Adjudged that this cause be and the same is hereby dismissed.”

Dated at Portland, Oregon, this 16th day of January, 1948.

/s/ HENRY L. HESS,
United States Attorney.

/s/ LINUS M. FULLER,
Special Assistant to the
U. S. Attorney.

/s/ BERT C. BOYLAN,
Special Assistant to the
U. S. Attorney.

[Endorsed]: Filed January 16, 1948. [49]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

Notice is hereby given that Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife, and Adelbert M. Hayes, single, defendants above named, hereby appeal and cross-appeal to the Circuit Court of Appeals for the Ninth Circuit from that part of the order entered in the above-entitled *clause* on October 20, 1947 and filed October 23, 1947, which vacated and set aside the verdict of the jury and the judgment on the verdict entered herein on September 25, 1947.

Dated at Portland, Oregon this nineteenth day of January, 1948.

/s/ JOHN W. McCULLOCH,
HICKS, DAVIS & TONGUE,
Attorneys for Defendants, Marcellus B. Hayes,
Mary I. Hayes, and Adelbert M. Hayes.

[Endorsed]: Filed January 19, 1948. [50]

[Title of District Court and Cause.]

MOTION

Come now the defendants Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife, and Adelbert M. Hayes, a single person, through Thomas H. Tongue, III, one of their attorneys, and move for an order granting leave to file a bond for costs, pursuant to a Notice of Cross-Appeal filed on January 19, 1948, in said case on behalf of the aforesaid defendants.

/s/ THOMAS H. TONGUE,
Of Attorney for Defendants Marcellus B. Hayes
and Mary I. Hayes and Adelbert M. Hayes.

Due and legal service of the foregoing Motion, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 2nd day of February, 1948.

/s/ LINUS M. FULLER,
Of Attorneys for Plaintiff.

[Endorsed]: Filed February 2, 1948. [51]

[Title of District Court and Cause.]

ORDER

This matter having come on for hearing regularly in open court on motion of defendants Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife, and Adelbert M. Hayes, a single person, appearing by and through Thomas H. Tongue, III, one of their attorneys, and good and sufficient reasons appearing therefor, it is hereby

Ordered that the aforesaid defendants may be and they are hereby granted leave to file a bond for costs pursuant to the notice of Cross-Appeal heretofore filed in said case on behalf of said defendants.

Dated this 2nd day of February, 1948.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed February 2, 1948. [52]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Bond No. 4915635

Whereas, Marcellus B. Hayes, Mary I. Hayes, also known as Bell Hayes, husband and wife, and Adelbert M. Hayes, single, defendants in the above-entitled action appeal to the Circuit Court of Appeals from an order made and entered against said defendants on October 20, 1947 and filed October 23rd, 1947.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, the Fidelity and Deposit Company of Maryland, of Baltimore, Maryland, a corporation organized and existing under the laws of the state of Maryland, and empowered to become surety upon bonds, undertakings, etc., does hereby undertake and promise, on the part of the appellant, that said appellant will pay all costs in a sum not exceeding Two Hundred Fifty and no/100 (\$250.00) Dollars, if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified.

[Seal]

FIDELITY AND DEPOSIT

COMPANY OF MARYLAND

By /s/ CLARENCE D. PORTER,

Attorney in Fact.

Countersigned

CLARENCE D. PORTER,

Resident Agent.

[Endorsed]: Filed February 2, 1948. [53]

[Title of District Court and Cause.]

MOTION

Come now Henry L. Hess, United States Attorney for the District of Oregon, and Linus M. Fuller, Special Assistant to the United States Attorney, and defendants Marcellus B. Hayes, et al., by and through Edwin D. Hicks, one of their attor-

neys, and based upon the attached affidavit, moves the Court for an order extending the time for filing the record on appeal and cross-appeal and docketing the action, granting to plaintiff and to said defendants ninety days from the date of the notice of appeal herein.

This motion is made pursuant to Title 28, Sec. 723 c, U.S.C.A., Rule 73(g).

Dated at Portland, Oregon, this 3rd day of February, 1948.

/s/ HENRY L. HESS,

United States Attorney for
the District of Oregon.

/s/ LINUS M. FULLER,

Special Assistant to the
United States Attorney.

/s/ EDWIN D. HICKS,

Of Attorneys for Marcellus B.
Hayes, et al. [54]

State of Oregon,
County of Multnomah—ss.

Affidavit

I, Linus M. Fuller, being first duly sworn, depose and say that I am a Special Assistant to the United States Attorney for the District of Oregon; that I am one of the attorneys of record representing plaintiff in the case in the District Court of the United States for the District of Oregon entitled “United States of America, Plaintiff, versus Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife; Adelbert M.

Hayes, single, and Harney County, a municipal corporation and political subdivision of the State of Oregon, Defendants, Civil No. 3124''; that notice of appeal was duly filed in said cause on the 16th day of January, 1948; that the plaintiff has been unable to obtain a transcript of the testimony adduced at the trial of said cause because the Court Reporter, Mr. Cloyd D. Rauch, who reported the trial of this cause is at the present time engaged in reporting a hearing before Mr. Estes Snedecor, the Referee in Bankruptcy, and is getting out a daily report of said hearing; that Mr. Rauch will not be able to complete the transcript in this cause before the 1st day of March, 1948.

This affidavit is made in support of a motion for an extension of time within which to file the record on appeal.

Dated at Portland, Oregon, this 3rd day of February, 1948.

/s/ LINUS M. FULLER.

Subscribed and sworn to before me this 3rd day of February, 1948.

[Seal] /s/ BERT C. BOYLAN,

Notary Public for Oregon.

My Commission Expires May 2, 1949.

[Endorsed]: Filed February 5, 1948. [55]

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard this date upon motion of plaintiff through its attorneys, Henry L. Hess, United States Attorney for the District of Oregon and Linus M. Fuller, Special Assistant to the United States Attorney, and upon the motion of Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife; Adelbert M. Hayes, single; appearing by and through Edwin D. Hicks, one of their attorneys, for an order extending time for the filing of the record on appeal and cross-appeal for docketing the within action and appealing to the Circuit Court of Appeals for the reason that the Court Reporter who reported the within action is engaged at the present time in reporting a hearing before the Referee in Bankruptcy and is unable at this time to prepare the transcript of the record and will be unable to complete said record before the 1st day of March, 1948, and the Court being fully advised in the premises, It Is Ordered that time for filing of the record on appeal and cross-appeal and docketing the within action be and it is hereby extended to ninety days from the date of the first notice of appeal.

Dated at Portland, Oregon, this 5th day of February, 1948.

/s/ CLAUDE McCULLOCH,
District Judge.

[Endorsed]: Filed February 5, 1948. [56]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY PLAINTIFF-APPELLANT

The United States of America, plaintiff-appellant, makes the following statement of points on which it will rely on appeal:

(1) The district court erred in striking the declaration of taking, vacating the judgment thereon and the order granting immediate possession and dismissing the proceedings.

(2) The district court erred in not permitting the contract between the parties to be presented to the jury as a measure of damages in this case.

(3) The district court erred in holding that the contract between the parties was negotiated by the agents of the Government in an unethical manner.

(4) The district court erred in refusing to enforce the contract between the landowners and the Government.

(5) The district court erred in setting aside the contract between the parties on the grounds:

(a) That the landowners did not know what was in it; [57]

(b) That the landowners thought they were getting an option to lease the land yearly at the expiration of the five-year reservation;

(c) That the landowners did not know they were compromising the damage claim against the Government; and

(d) That the agents who negotiated the contract for the Government were unethical in writing into the contract things that the landowners did not agree to and stipulations entirely contrary to what their agreement was.

(6) The district court erred in holding that if the Declaration of Taking were left standing, and not dismissed by the Government, it would consider the amount set by the jury as the final judgment.

(7) The district court erred in permitting evidence of value of the land in excess of the consideration expressed in the agreement, that is \$16,000, with the five-year reservation.

(8) The district court erred in allowing testimony as to the production of grain on the tract of land as early as 1929 and 1931.

(9) The district court erred in overruling the Government's motion to strike testimony as to the valuation of the property by witnesses who did not take into consideration the reservation of five years' use of the land in making their appraisal.

/s/ HENRY L. HESS,

United States Attorney.

/s/ LINUS M. FULLER,

Special Assistant to the

United States Attorney.

State of Oregon,
County of Multnomah—ss.

I, Edwin D. Hicks, do hereby admit due and legal service of the within Statement of Points to be Relied Upon by Plaintiff-Appellant in Multnomah County, Oregon, on this 7th day of April, 1948, by receiving a true copy thereof duly certified to be such by Linus M. Fuller, one of the attorneys for Plaintiff-Appellant. I further certify that I am a resident and inhabitant of the said County, and that I am one of the attorneys of record for the Defendant-Appellants.

/s/ EDWIN D. HICKS,

One of the Attorneys for the
Defendant-Appellant.

[Endorsed]: Filed April 7, 1948. [59]

[Title of District Court and Cause.]

**STATEMENT OF POINTS TO BE RELIED ON
BY CROSS-APPELLANTS**

Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes and Adelbert M. Hayes, defendants and cross-appellants herein, make the following statement of points on which they will rely on appeal:

1. The District Court erred in striking the declaration of taking, vacating the judgment thereon and the order granting immediate possession and dismissing the proceedings.

2. The District Court erred in holding that the verdict of the jury as to the value of the property involved was excessive.
3. The District Court erred in holding that the jury, in determining the value of said property, did not give proper value to the reservation retained by defendants and disregarded the instructions of the Court to give value to said reservation.
4. The District Court erred in holding that it was error on the part of the Court to deny admission into evidence of the contract between the parties as a measure of damages in this case. [60]

HICKS, DAVIS & TONGUE,
J. W. McCULLOCH,
Attorneys for Cross-
Appellants.

A true Copy:

/s/ THOMAS N. TONGUE III
of Attys for Cross-Appellants.

Due and legal service of the foregoing statement of points to be relied on by Cross-Appellants, by receipt of a duly certified copy thereof, is hereby accepted in Multnomah County, Oregon, on this 12th day of April, 1948.

LINUS M. FULLER,
Of Attorneys for
United States.

[Endorsed]: Filed April 12, 1948. [61]

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL
EXHIBITS

On motion of the plaintiff and appellant herein, and good cause appearing therefor, It Is Hereby Ordered that original Exhibits numbered 1, 2, and 3 in the above cause be transmitted to the Circuit Court of Appeals in connection with the appeal of this case.

Dated this 12th day of April, 1948.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed April 12, 1948. [62]

[Title of District Court and Cause.]

DOCKET ENTRIES

1946

Apr. 22—Filed Complaint.

Apr. 22—Issued summons—to Marshal.

Apr. 22—Filed praecipe U. S. for cert. copy of complaint—issued.

Aug. 13—Filed motion for leave to file amended complaint.

Aug. 13—Filed and entered order granting leave to file amended complaint. Fee.

Aug. 13—Filed amended complaint.

Aug. 13—Filed praecipe, U. S. summons and 4 copies on amended complaint.

1946

Aug. 13—Issued summons on amended complaint—to Marshal.

Aug. 13—Filed summons returned unexecuted.

Sept. 19—Filed answer of Harney County, Oregon.

Oct. 2—Filed ans. of Bell Hayes & Marcellus B. Hayes.

1947

Feb. 11—Filed declaration of taking.

Feb. 11—Filed praecipe U. S. for dup. receipts of clerk for \$16,000.00 on deposit—issued.

Feb. 13—Filed motion for order granting leave to file 2nd amended complaint.

Feb. 13—Filed & entered order granting leave to file 2nd amended complaint. McC.

Feb. 13—Filed second amended complaint in condemnation.

Feb. 14—Filed praecipe U. S. summons on 2nd amended complaint.

Feb. 15—Issued summons on 2nd amended complaint—to Marshal.

Feb. 26—Filed praecipe U. S. for 2 cert. copies of Judgment on Decl. of Taking and Order Granting Immediate Possession—issued.

Feb. 26—Filed & entered judgment on declaration of taking & for immediate possession. McC.

May 8—Filed Transcript of Proceedings Feb. 27, 1947.

Aug. 29—(Burns) Entered order setting for trial Sept. 17, 1947, at Burns. Fee.

1947

Sept. 11—Filed reply to answer of defts. Bell Hayes & Marcellus B. Hayes.

Aug. 23—(Burns) Filed answer of deft. Harney Co.

Sept. 19—(Burns) Record of empaneling jury & trial, order continuing cause to Sept. 24, 1947. Fee.

Sept. 19—(Burns) Filed & entered order for jury view. Fee.

Sept. 19—(Burns) Filed motion to strike further & separate reply of U. S. to further & separate answer of Marcellus B. Hayes, et al.

Sept. 24—(Burns) Record of trial, jury excused until Sept. 25, record of trial of certain issues before the Court. Fee.

Sept. 25—(Burns) Record on trial verdict for \$36,500.00 value & Judgment fixing value entered. Fee.

Sept. 25—(Burns) Filed verdict.

Sept. 27—(Burns) Filed exhibits 1, 2 & 3.

Oct. 2—Filed Judgment on verdict.

Oct. 3—Filed Motion to set aside verdict of the jury.

Oct. 3—Filed praecipe U. S. for cert. copy of judgment on verdict—issued.

Oct. 20—Entered order setting aside verdict & judgment striking declaration of taking from files, vacating order for immediate possession and Judgment on declaration of taking and dismissing cause. Fee.

1947

- Oct. 23—Filed excerpts in re Motion to set aside verdict of the jury.
- Oct. 23—Filed order setting aside verdict & judgment, striking declaration of taking from files, vacating order for immediate possession and Judgment on declaration of taking & dismissing cause.
- Oct. 23—Filed praecipe, U. S. for 2 cert. copies of order—issued. [63]

1948

- Jan. 2—Filed (2) summons with return.
- Jan. 7—Filed judgment roll.
- Jan. 16—Filed notice of appeal by U. S.
- Jan. 16—Copy notice of appeal to McCulloch, Hicks & Tongue, and to Leland & Duncan.
- Jan. 19—Filed Notice of Cross-Appeal. Tongue.
- Jan. 19—Mailed copy of Notice of cross-appeal to Henry L. Hess.
- Feb. 2—Filed motion for order for leave to file bond pursuant to notice of cross-appeal.
- Feb. 2—Filed & entered order for leave to file bond pursuant to notice of cross-appeal. McC.
- Feb. 2—Filed bond for costs on appeal.
- Feb. 5—Filed motion for order allowing 90 days to file & docket appeal, etc.
- Feb. 5—Filed & entered order allowing 90 days to file & docket appeal. McC.
- Mar. 12—Filed Transcript of Testimony & Proceedings.

1948

Apr. 7—Filed Statement of points.

Apr. 7—Filed Designation of record.

Apr. 12—Filed statement of points of cross-appellant. [64]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes now the United States of America, the appellant herein, pursuant to Rule 75, Federal Rules of Civil Procedure, and designated the following portions of the record to be contained in the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause:

1. Complaint in condemnation filed April 22, 1946.
2. Summons issued April 22, 1946.
3. Order granting leave to file amended complaint entered August 13, 1946.
4. Amended complaint in condemnation filed August 13, 1946.
5. Summons on amended complaint issued August 13, 1946.
6. Answer of Bell Hayes and Marcellus B. Hayes, filed October 2, 1946.
7. Declaration of Taking filed February 11, 1947.

8. Order granting leave to file Second Amended Complaint filed February 13, 1947.
9. Second amended complaint in condemnation filed February 13, 1947.
10. Summons on second amended complaint issued February 15, 1947.
11. Judgment on Declaration of Taking and Order granting immediate possession, entered February 26, 1947.
12. Reply to answer of defendant Bell Hayes and Marcellus B. Hayes filed September 11, 1947.
13. Motion to strike further and separate reply of United State to further and separate answer of Marcellus B. Hayes, et al., filed September 19, 1947.
14. Verdict of jury filed September 25, 1947.
15. Exhibits 1, 2 and 3. [65]
16. Judgment on verdict filed October 2, 1947.
17. Motion to set aside verdict of jury filed October 3, 1947.
18. Order setting aside verdict and judgment, striking Declaration of Taking from files, vacating order of immediate possession and judgment on Declaration of Taking and dismissing cause entered October 20, 1947.
19. Two summons with returns filed January 2, 1948.
20. Notice of appeal by plaintiff dated and filed January 16, 1948.
21. Notice of cross-appeal filed by defendants January 19, 1948.

22. Motion for order for leave to file bond pursuant to notice of cross-appeal filed February 2, 1948.
23. Order for leave to file bond pursuant to notice of cross-appeal filed and entered on February 2, 1948.
24. Bond for costs on appeal filed February 2, 1948.
25. Motion for order allowing 90 days to file and docket appeal filed February 5, 1948.
26. Order allowing 90 days to file and docket appeal filed and entered on February 5, 1948.
27. Transcript of testimony filed March 12, 1948.
28. Statement of points to be relied upon by plaintiff-appellant filed April 7, 1948.
29. Designation of contents of record on appeal filed April 7, 1948.
30. Statement of points by cross-appellant.
31. Docket entries.

/s/ HENRY L. HESS,
United States Attorney for
the District of Oregon.

/s/ LINUS M. FULLER,
Special Assistant to the
United States Attorney.

State of Oregon,
County of Multnomah—ss

I, Edwin D. Hicks, do hereby admit due and legal service of the within Designation of Contents of Record on Appeal on this 7th day of April, 1948, by receiving a true copy thereof duly certified to be

such by Linus M. Fuller, one of the attorneys for Plaintiff-Appellant. I further certify that I am a resident and inhabitant of the said County, and that I am one of the attorneys of record for the Defendant-Appellants.

/s/ EDWIN D. HICKS,

One of the Attorneys for the Defendant-Appellants.

[Endorsed]: Filed April 7, 1948. [66]

United States of America,
District of Oregon—ss.

CLERK'S CERTIFICATE

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 67 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 3124, in which the United States of America is Plaintiff and Appellant, and Marcellus B. Hayes, Mary I. Hayes, and Adelbert M. Hayes, are defendants, Appellees, and Cross-Appellants; that the said transcript has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said cause, in accordance with the said desig-

nation as the same appears of record and on file in my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony and proceedings taken and filed in this cause, together with exhibits Nos. 1, 2 and 3 filed in said cause.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 13th day of April, 1948.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy. [67]

In the District Court of the United States
for the District of Oregon

No. Civ. 3124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARCELLUS B. HAYES and MARY I. HAYES,
also known as BELL HAYES, husband and
wife; ADELBERT M. HAYES, single; and
HARNEY COUNTY, a municipal corporation
and political subdivision of the State of Oregon,
Defendants.

Before: Honorable James Alger Fee,
Judge.

Appearances:

Messrs. Bert C. Boylan and Linus M. Fuller,
Special Assistants to the United States Attorney,
appearing for United States of America, plaintiff;

Messrs. John W. McCulloch and Edwin D. Hicks,
attorneys for defendants Hayes;

Honorable Leland S. Duncan, District Attorney
for Harney County, Oregon, appearing for Defend-
ant Harney County, Oregon.

Court Reporter: Cloyd D. Rauch. [1*]

Burns, Oregon,
Friday, September 19, 1947,
1:30 P.M.

PROCEEDINGS

The Court: United States versus Bell Hayes, Civil 3124, called for trial.

Mr. Hicks: The defendants are ready, your Honor.

Mr. Fuller: The plaintiff is ready.

The Court: Call a jury.

(A jury was duly empanelled and sworn.)

Mr. Fuller: If the Court please, at this time we are moving the Court for an order for this jury to be taken to a view of the premises in the custody of the United States Marshal.

Mr. Hicks: In which we join.

The Court: The Court grants the order and will direct a view of the premises.

Ladies and gentlemen, as I told you at the outset, the Court is drawing this jury today because it is more convenient, in order to give a proper start on next Wednesday morning. So after the Court gives you these instructions you will be allowed to go home and stay there and be back here at nine o'clock next Wednesday morning. At that time you will be taken to view these lands and then return in court and the case will probably be tried sometime the next day. So this puts somewhat of a burden on you, in a way, because you are now [2] drawn, and you were drawn on account of your fair and im-

partial attitude. Now, the only difficulty about separating you for such a length of time is that you may be in the presence of some people that may talk about the case, or something of the sort, and it is a little difficult to always avoid that sort of a thing, and I instruct you that up until the time that the case is submitted to you by the Court you should not discuss it among yourselves, nor discuss it with other persons, and that means talking it over at home or with anybody else on the outside; and, further, you should not remain in the presence of people who are discussing it. Sometimes people, casual witnesses, and so forth, begin to discuss the case in your presence. If you hear anything of that sort you should get out of the way so you won't hear anything, if you can help it, and if anybody persistently does that, why, of course, you report that to me. I don't think that will happen however.

So now, with that admonition, I now excuse you until Wednesday morning at ten o'clock. You are now excused.

(Whereupon, at the hour of 2:15 o'clock p.m., the jury was excused and the trial of the cause was continued to 9:00 o'clock a.m., Wednesday, September 24, 1947.) [3]

Wednesday, September 24, 1947, at the hour of 9:58 o'clock a. m., the trial of the above-entitled cause was resumed and continued as follows:

The Court: Will you call the names of the jurors in the Hayes case.

(The roll of the jury was thereupon called by the Clerk of the Court.)

The Clerk: The jurors are all present, your Honor.

The Court: Ladies and gentlemen, you will take the box in your regular order, please. Is transportation now available?

Ladies and gentlemen, the attorneys have requested a view of the premises and the Court is about to send you down to look this property over, and you will remember what I have said to other juries. You will be in charge of the United States Marshals. They will do whatever they can for your comfort and convenience, but they will keep you together in a body, so that each juror will see what every other juror sees. The United States Marshals are not advised as to the issues of the case, so there is no use asking them anything that has to do with the situation. So you will simply have to wait until the evidence comes in. The Court will not be able, through press of business, to go with you, but you will be taken down there in a bus, and anything that you want to see, anything that the jury as a whole wants to see, you will be allowed to see, and the Marshals are instructed to follow a line that will show you [4] most of the property, anyhow; but if there is anything specific you want to see they will have the bus stop so you can be taken over there. There is some of it you won't be able to get to, but otherwise than that you will be given an opportunity to see whatever you want to see on the premises.

Again I admonish you that you are not to talk this matter over among yourselves nor with other

persons nor remain in the presence of other persons until the time it is finally submitted.

You are now placed in charge of the United States Marshals and they will take you to a view, and you will return here this afternoon.

Mr. Fuller: If the Court please, we have a map——

Mr. Hicks: No objection.

The Court: The map will now be admitted.

(The map so produced and received, was thereupon received as Government's Exhibit 1.)

RT
N

Clerk
PUTY

"B"

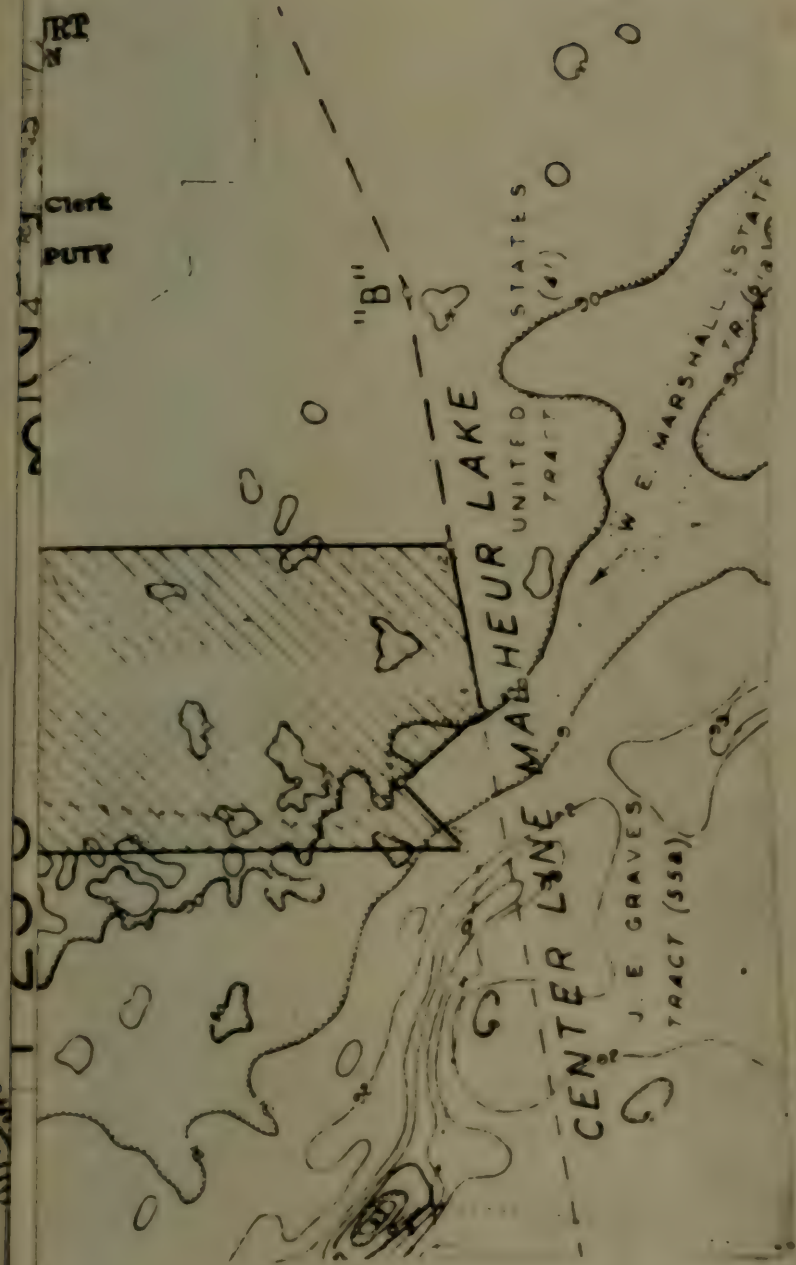
MAHEUR LAKE

UNITED STATES
TRACT (41)

W E MARSHALL ESTATE
TRACT (13)

CENTER LINE

J. E. GRAVES
TRACT (552)



persons nor remain in the presence of other persons until the time it is finally submitted.

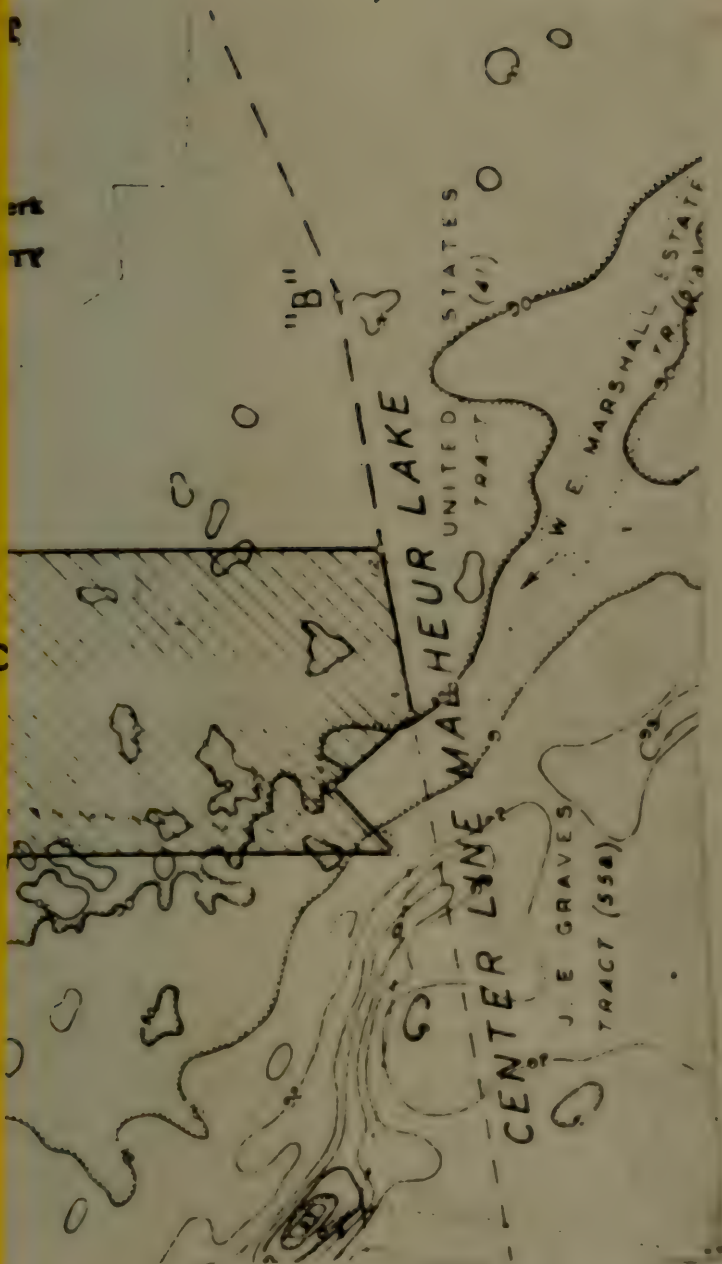
You are now placed in charge of the United States Marshals and they will take you to a view, and you will return here this afternoon.

Mr. Fuller: If the Court please, we have a map——

Mr. Hicks: No objection.

The Court: The map will now be admitted.

(The map so produced and received, was thereupon received as Government's Exhibit 1.)



The Court: If there is no objection on the part of anybody, I will allow the Marshals to show the map to the jurors while they are on the place.

Mr. Fuller: No objection.

Mr. Hicks: No objection.

The Court: You are now excused, in charge of the Marshals.

(Whereupon, at the hour of 10:02 o'clock a. m., Wednesday, September 24, 1947, the jury departed to view the [5] premises involved herein, and at the hour of 3:10 o'clock p. m. of said date the jury returned to the presence and hearing of the Court, and the following proceedings were had:)

The Court: Ladies and gentlemen, the Court is trying another proceeding at this time and will not be able to reach this case until tomorrow morning. Since you have had your exercise for today, I now excuse you until tomorrow morning at nine o'clock, and at the same time I suggest to you that you follow the former admonitions regarding communications; in other words, do not discuss the case amongst yourselves nor with other persons nor remain in the presence of other persons who may be discussing it, until it is finally submitted.

You are now excused until tomorrow morning at nine o'clock.

(The jury was thereupon excused from the presence and hearing of the Court, and thereafter, at 3:30 o'clock p. m. of this 24th day of September, A. D. 1947, further proceedings herein were had before the Court, not in the presence of the jury, as follows:)

The Court: Did you decide to try the Hayes case first?

Mr. Hicks: Yes, your Honor.

Mr. Fuller: If the Court please, at this time we are offering in evidence contract of agreement for acquisition of lands between M. B. Hayes, Mary I. Hayes and Delbert M. Hayes and the Government for the acquisition of a tract of land designated [6] as Tract No. 17, comprising 1101.68 acres, the description of the land being set forth in the agreement, together with a signed letter of acceptance from the Department of the Interior.

Mr. Hicks: May it please the Court, before making my objections on the offer, may I make this statement into the record? This particular problem in the related proceeding is a different problem, in that a somewhat different question arising in a different way has already been considered before, and the Court, irrespective of our contentions, has considered that the matter should be considered by the Court and should not be considered by the jury in the trial of the case. I understand that is your Honor's position regarding the matter now, and I simply wanted the record to note, under the authorities that we submitted here, that on the question of the overreaching here, the very circumstances attending the execution was a matter for consideration of the jury. I simply wanted to state it for the purposes of the record and ask you to consider it in your Honor's ruling, if that is your Honor's ruling.

The Court: Yes.

Mr. Hicks: In regard to the offer just made, we admit that it was signed by the parties, that it does bear the signatures of the parties involved, and that the—I assume that it is an acceptance—we admit that this is a copy and that the signature is that of Mr. Johnson. The only objection I have at all is that it is incompetent, irrelevant and immaterial, [7] in view of the issues that are before your Honor now. In that connection, I point out the circumstance that at the time this document was signed by the Hayeses, in accordance with the date shown, there was pending in this Court an action in condemnation for the taking of the lands described in the contract. That case was pending. There had not been, however, a Declaration of Taking at that time. I expect, of course, to offer as exhibits the pleadings to identify the dates of their filing and to show that the case was pending at that time, and, that being true, and in view of the prayer of the original complaint and of the reply filed herein, which is that this Court assess just compensation, in view of the pleadings, in view of the action in condemnation, that any attempt by Government agents to *forclose* the Court of its duty and obligation, and of the jury to assess just compensation, is not in accordance with the Court's decision, and for that reason is incompetent, irrelevant and immaterial.

The Court: Admitted.

(Said agreement and accompanying letter of acceptance from Department of the Interior, so offered and received, were thereupon marked received as Government's Exhibit 2.)

GOVERNMENT'S EXHIBIT NO. 2

[Letterhead United States Department of the
Interior Fish and Wildlife Service]

Registered Mail

Mr. M. B. Hayes,

Box 368,

Burns, Oregon.

Chicago, Ill.,

Dec. 16, 1946

Dear Mr. Hayes:

On October 9, 1946, you, Mary I. Hayes, your wife, and Adelbert M. Hayes, executed an agreement providing for the sale of 1,101.68 acres of land, more or less, in Harney County, Oregon to the United States of America at a total cost of \$16,000.00. This agreement included a provision that it might be accepted at any time within three months after execution by you.

You are hereby notified that the offer to sell this land was accepted and executed on behalf of the United States of America on the date at the head of this letter, and that it now is a binding agreement. A copy of the purchase agreement as executed is enclosed for your file.

Very truly yours,

O. H. JOHNSON,

Acting Director.

[Stamped] Received Dec. 24, 1946, Department
of Interior, Fish and Wildlife Service, Region 1.

GAO

Accts.

Refuge Div. Region Title.

Mr. Adelbert M. Hayes,
Box 368,
Burns, Oregon.

Dec. 16, 1946.

Dear Mr. Hayes:

On October 9, 1946, you, M. B. Hayes and Mary I. Hayes, his wife, executed an agreement providing for the sale of 1,101.68 acres of land, more or less, in Harney County, Oregon to the United States of America at a total cost of \$16,000.00. This agreement included a provision that it might be accepted at any time within three months after execution by you.

You are hereby notified that the offer to sell this land was accepted and executed on behalf of the United States of America on the date at the head of this letter, and that it now is a binding agreement.

A copy of the purchase agreement as executed has been transmitted to M. B. Hayes.

Very truly yours,

/s/ O. H. JOHNSON,

cc: GAO Acting Director.

ACCTS

Region

Refuges

Title

[Stamped]: Received Dec. 24, 1946, Department of Interior, Fish and Wildlife Service, Region 1.

[Endorsed]: Filed April 10, 1948.

[The Agreement for Acquisition has been previously printed at pages 46 to 53 and is not reprinted here.]

Mr. Hicks: We will call Mrs. Hayes. [8]

MARY I. HAYES

one of defendants herein, was thereupon produced as a witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Q. Mrs. Hayes, will you please state your name?

A. Mary I. Hayes, or Bell, better known as Bell.

Q. Mrs. Hayes, you are the wife of Marcellus B. Hayes, is that correct? A. Yes.

Q. And what is your age, Mrs. Hayes?

A. I will be seventy-four years old the first day of February of this year, this next year.

Q. You are seventy-three now?

A. I am seventy-three now.

Q. And what is Mr. Hayes' age, your husband?

A. He is eighty-three. He will be eighty-four the seventeenth of February.

Q. Now, Mrs. Hayes, you are Mary I. Hayes——

A. Mary I. Hayes, or Bell Hayes, known as Bell Hayes. My name is Isabelle.

Q. ——who is named in the pleadings in this case?

A. Yes. I was always called Bell at home, and naturally have gone through life—— [9]

Q. Mrs. Hayes, you are familiar, of course, with the Malheur Lake litigation? A. Yes, I am.

Q. And how long has that been pending, to your knowledge?

(Testimony of Mary I. Hayes.)

A. The first case between the State of Oregon and the Government was in '31, 1831.

Q. You mean 1931? A. 1931.

Q. And can you state about the time that Mr. McCulloch first began representation of you and Mr. Hayes as attorney?

A. If I remember, it was in '38, the trial we had in 1938.

Q. And who have been your attorneys continuously since that time in respect to this litigation?

A. Well, it was Mr. Duncan and Mr. McCulloch, until Mr. Duncan died. Since that time it has been Mr. Hicks and Mr. McCulloch.

Q. Were those parties serving as your attorneys throughout the dates you mention up to the present time, with the exception of Mr. Duncan, who is now deceased? A. Yes.

Q. And I take it that Mr. McCulloch and myself are presenting you in the proceeding at this time?

A. You certainly are.

Q. Was there ever a time in that period when you had discharged either Mr. McCulloch or myself as your attorneys? A. No sir. [10]

Q. Referring to Government's Exhibit 2 in this cause, I hand it to you, Mrs. Hayes, and ask you whether or not you signed it and whether you received in the mail a letter of the form as shown on the exhibit as a part of it?

A. This is that contract, isn't it? Yes, that's our signatures.

Q. Now, Mrs. Hayes, will you state to the Court,

(Testimony of Mary I. Hayes.)

in your own way, the circumstances which led up to the execution of that form of agreement by yourself and your husband.

A. Well, Mr. Schaar met Mr. Hayes down town several times, kept wanting to get this land. He called me over the phone several times, and I told him we wouldn't talk to him at all unless we were all three present. So finally he called up one time, and we happened to all be at home, and I said, "Come on up," and he came, and at this time we had already been served with the notice of the condemnation suit and had sent our papers to Mr. McCulloch and he had filed our answer. So Mr. Schaar, he said it would be better to compromise, and that he was trying to get to compromise all the settlers and he had hopes of keeping it out of court, settling it out of court, and offered us \$11,000, and we told him we wouldn't consider it at all; and he talked on and talked on, and finally we did agree on \$16,000 and the use of the place for five years free, and we was to have our money at once. We owed bills and we were going to California on a trip and we wanted this money before we went. He said we could get our money in a month, but not later than two months. Well, that was in October, I believe the 8th. Anyway, it was October, the first of October. Well, we kept waiting and waiting and we didn't hear, we didn't know what had happened, so we put our trip off, we didn't meet these bills. We went to California, started to California, the thirtieth of January, and as we came home we passed the post

(Testimony of Mary I. Hayes.)

office, Alfred Brown was there, and he said, "Your money has been deposited for you." So that was the second day of March, and that is all the notice that we ever got that our money was deposited.

Q. Well, now, Mrs. Hayes, how many discussions were there altogether, as best you can recollect, concerning the acquisition by the Government of your lands, in respect to this option?

A. You mean with Mr. Schaar?

Q. Yes.

A. Well, I would say he was up there three or four times. I just wouldn't be quite positive.

Q. And the matter was discussed, then, on three or four different occasions?

A. Yes, it was. We told him the land wasn't for sale, we had never offered it for sale, and we was just simply making this compromise in order to keep out of court, and he promised us if it did come to court all of this proceedings between him and us would be strictly confidential, it would never be made public.

Q. Now, Mrs. Hayes, you say that you didn't want to sell. If you didn't want to sell, why did you sign the papers? [12]

A. For this reason: The Government had filed these condemnation papers, and he said we would lose it anyway, the Government would get it, and he thought it would be better to compromise rather than have it go to court.

Q. You say he said the Government would get it?

(Testimony of Mary I. Hayes.)

A. Well, they would take it, yes; they would file this suit and they would get the lands.

Q. And you said something about another program he had regarding other persons. Will you tell us, as fully as you can, what was said?

A. Well, he said he had talked with several of them and he felt very favorable that he going to get a compromise from all of them and there would be no trials in court.

Q. And did you believe that?

A. Certainly I did.

Q. Was anything said by either you or Mr. Hayes, your husband, concerning the question as to whether or not you wanted to sell?

A. We told him very plainly that our land was not for sale and never had been; we had owned that land ever since 1910 and had had lots of chances to sell it and if we had wanted to sell it we would have sold it years ago.

Q. Mrs. Hayes, in connection with these conversations you had, was anything said about your attorneys?

A. Yes, there was. We told him we didn't want to sign anything unless it was favorable with our attorneys, we didn't want to [13] do anything against their wishes or that would make them mad.

Q. And then after you first talked to Mr. Schaar did you write a letter to Mr. McCulloch concerning the matter?

A. Mr. Hayes did. That was the understanding

(Testimony of Mary I. Hayes.)

between him and Mr. Schaar, that Ted would write to Mr. McCulloch and see what he said about it.

Q. And did Mr. McCulloch answer that letter?

A. He did.

Mr. Hicks: May I have this marked.

(The letter referred to, so produced, was thereupon marked for identification as Defendants' Exhibit 3.)

Q. (By Mr. Hicks): Is Defendants' Exhibit 3 for identification a letter you received from Mr. McCulloch in response to Mr. Hayes' letter?

A. Well, I suppose it is, but, Mr. Hicks, I never read it. Mr. Schaar and Ted did, but I never did, but I suppose that is the letter.

Q. Was a letter discussed by you and Mr. Schaar and Mr. Hayes in these discussions?

A. There was.

Q. But you would not be able to tell whether this is the letter or not?

A. Well, I think it was. It was in regard to the land and the signing of the compromise. I think that is the letter. What is the date of it? [14]

Q. October 1st, 1946.

A. I think that is the letter, yes.

Mr. Hicks: We would like to offer this.

Mr. Boylan: No objection.

The Court: Admitted.

(The letter referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendants' Exhibit 3.)

(Testimony of Mary I. Hayes.)

DEFENDANTS' EXHIBIT NO. 3

[Letterhead Edwin D. Hicks]

October 1, 1946.

Mr. M. B. Hayes
Burns, Oregon

Dear Sir:

I am in receipt of your recent letter, reporting an offer to compromise the condemnation case brought against you by the government. Before receiving your letter we had prepared your answer, as we were required to do, and I am sending to you herewith a copy of the answer.

Of course I do not like to tell you not to settle the case, but it is my judgment that you should not.

The offer of \$25 per acre for the lands above the meander line may not be too far off, but in my judgment the lake lands should not be sold for \$12.50 per acre. Personally, I would value the lake lands as high, or perhaps higher than the deeded lands. We are saying in the answer that the lands for all purposes are worth \$50 per acre, and we can produce witnesses who will support our statement. The eighteen years from 1923 to 1941 were years in which the production would support a \$50 per acre value, and besides, lands have gone up in price, or the dollar value has gone down. Lands exactly like your lake lands are selling in the Klamath Falls country for big prices; for \$125 per acre and up. A system of diking or otherwise controlling the water would make your lands worth \$125 per acre.

(Testimony of Mary I. Hayes.)

Think it over, and you will not want to compromise.

I might say also that in my opinion, the government agent was merely trying to get a statement from you as to value. He does not have any power to purchase, nor has he been requested to purchase. The facts are that months ago the "duck people" reported to the Secretary of the Interior that the lands could not be acquired by purchase. The complaint served on you says that the Secretary of the Interior has determined that your lands shall be acquired by condemnation proceedings, and that the matter has been turned over to the Attorney General, who is to acquire the lands by condemnation proceedings. Before the Secretary of the Interior, or any "duck man" can now purchase your lands, it will be necessary for the Attorney General to dismiss the case against you and turn the whole matter back to the Secretary of the Interior. This, of course, is possible, but it is extremely unlikely.

You say in your letter that you considered what the George lands were valued at by the jury. The value of the George lands was as of 1935. You are not now selling cattle or anything for the same as you sold for in 1935. Recently, a stockman told me that he expected to sell his yearlings this fall for about \$130 a head. That is more than twice as much as he secured in 1935.

The offer of settlement is less than \$15 per acre for the entire tract. You can't buy a similar tract anywhere for twice that amount. If you think you

(Testimony of Mary I. Hayes.)

can, just get in the old car and drive around over the state and try.

If you are asking my advice, I think the foregoing statement is my answer.

Respectfully,

J. W. McCULLOCH.

[Endorsed]: Filed Apr. 10, 1948.

Mr. Hicks: Would the Court want to read this before we proceed?

The Court: Yes. Admitted. It may be marked later.

Q. (By Mr. Hicks): Now, Mrs. Hayes, was Mr. Schaar shown a copy of this letter in any of these conversations?

A. Mr. Hayes handed him the letter to read.

Q. And he did read it, did he?

A. He read it.

Q. And did Mr. Schaar say anything to you folks concerning the letter?

A. Yes, he said that he didn't feel that Mr. McCulloch—he didn't tell us to sell it—or to not sell it. He told it in a nice way, but he said that he took it for granted that it would be all right with Mr. McCulloch for us to sign it.

Q. Well, did he give you any kind of advice at all there in [15] connection with this contract,—Mr. Schaar?

A. Why, he always wanted us to sign it. He said

(Testimony of Mary I. Hayes.)

anything to keep it out of court would be better than going to court. Of course, we told him that if we were selling this land otherwise we would ask a lot more money for it, but since the Government was going to take it and it had to go through court we compromised on that basis, in order to keep it out of the court and the expense of the court trial.

Q. I understood you to say that Mr. Schaar told you the Government was going to take the land anyway.

A. Yes, he said they had filed a proceeding to get it.

Q. Did you believe what he told you in that regard?

A. Sure I did. He was a government attorney and I supposed he was representing them truthfully.

Q. Do you remember the circumstances and the time that the agreement between the Government and you two was actually signed by you folks?

A. Well, I couldn't remember the date,—I think it is on there—but I think it is the 8th of October.

Q. I am not concerned about the date, but what happened that day?

A. Well, he was there quite awhile, and of course it was talked about all the time, and we repeated to him again that this land never was for sale, never had been, and we wouldn't sign it at all under any other conditions only to keep it out [16] of court, since the Government was taking it.

(Testimony of Mary I. Hayes.)

Q. Was there any discussion in any of these conversations concerning the damage case?

A. Nothing was mentioned in my presence in the way of a discussion.

Q. Did you ever read this contract before——

A. No, I didn't. I am sorry to say that I didn't.

Q. You were capable of reading, were you?

A. Sure, I could have read it. I simply trusted to what Mr. Schaar said, and I think Mr. Hayes read it. I thought he did, anyway.

Q. But you didn't read it?

A. I didn't. I never have read it.

Q. Before signing it did you see an attorney or anyone to ask advice on it? A. No sir.

Q. Did you sign it on the same day and within the same hour that Mr. Schaar brought it to you?

A. Yes, the last time, yes.

Q. And was that the first time you had ever seen the agreement?

A. Well, it seems to me like there was some mistake or something, and I think Mr. Woodward came back there once. I think there was something wrong, but I just can't recall that.

Q. But did Mr. Schaar bring this to the house with him.

A. The last time he brought it to the house with him. [17]

Q. Was that the first time you had ever seen that contract, that document?

A. Yes, it sure was.

Q. Then was that signed up that same day?

(Testimony of Mary I. Hayes.)

A. That same day.

Q. And did you know at that time exactly what your claim was under the Tucker Act, your suit for damages?

A. I didn't know there was a Tucker Act.

Q. But did you know there was a suit for damages?

A. I knew there was a suit for damages, but you and Mr. McCulloch had full charge of that and I didn't pay any attention to it.

Q. Did you know how much was involved in that suit for damages?

A. No, I didn't, but when I talked to Mr. McCulloch he didn't know what the amount would be, but he said it would be quite a sum, he thought.

Q. And did you know anything about the merits of that claim? That is, as to whether or not it was a good damage claim or not a good one?

A. Well, we thought it was a good damage claim. At the time that flooded us out, one of the attorneys told us, Mr. Ketchum told us—I guess everybody knows he tried to buy it, and we wouldn't sell it to him, and he said, "If you don't sell it to us we will drown you out," and of course that was a good start.

Q. Now, did anyone advise you concerning that Tucker Act or that damage suit before you signed these papers? [18]

A. No.

Q. And state whether or not when you did sign them you knew there was anything in there about the damage case?

(Testimony of Mary I. Hayes.)

A. No, it wasn't discussed between us at all, and naturally I didn't look for it. If I had read the contract I suppose I would have objected, because I didn't know anything about that.

Q. No attorney here in Burns or any place else looked over that contract and explained it to you?

A. Not in my presence, no, or not to my knowledge.

Q. Was Mr. Hayes there at the time the contract was brought to the house? A. Yes.

Q. Did he likewise sign on the same day that you signed? A. Yes.

Q. And were you left a copy of that contract by Mr. Schaar? Did he leave a copy with you?

A. Yes, and we sent that copy to you.

Q. You sent it to us within the last two or three weeks?

A. Yes. We didn't send it to you at the time. We sent it to you as soon as the court convened here at this time. Or was it before?—No, we sent it afterwards. We sent it during the first recess of the court, I guess you would call it.

Q. Now, Mrs. Hayes, after that document was signed by you and your husband did you, a short time after that, have served upon you certain other legal papers in this case? [19]

A. No sir, I did not.

Q. You were not served with an amended complaint?

A. Oh, yes, with an amended complaint, but I

(Testimony of Mary I. Hayes.)

was sick; I was in the hospital and I didn't know anything about that.

Q. Now, have either you or your husband drawn down any of the money that was deposited in court under the Declaration of Taking in this case?

A. No sir, only the one dollar they sent.

Q. Well, the one dollar was given to you for the option, was it not?

A. It came afterwards, yes. We didn't get it that day.

Q. But no money has been drawn down from the registry of the Court? A. No.

Q. Now, did you later notify the Government agents that you did not want to be bound by this agreement that you signed?

A. Well, since this proceedings here they have been notified, yes, since the Judge—I don't know, I wasn't here that morning, but I understood that he ruled that it wasn't legal.

Q. Now, this property is in your name alone, is it not, Mrs. Hayes? A. Yes, it is.

Q. And I understand you paid for it out of growing chickens and turkeys?

A. I did. We bought the place, in the first place, in 1910, [20] and, as everyone knows—or, they didn't know that—we bought it subject to a State mortgage, and, as you all know, the State renews a mortgage every ten year. Well, the first ten years was up, and the next ten years I said, "When it comes due I want to pay it of," and in the meantime Mr. Hayes had been kind enough to go on a

(Testimony of Mary I. Hayes.)

good many security notes and he didn't have the money to take care of those, and I raised geese and turkeys and chickens and butter and I paid the mortgage off, and that is how it came to be in my name.

Q. Now, Mrs. Hayes, have you yourself expressed a willingness to the Government agents to let them keep the money that they had deposited?

A. Well, I offered them the dollar back, and I think Mr. Hayes told them——

Q. Well, you can't tell what somebody else said.

A. Well, I understood that they had been informed.

Q. Are you willing at this time, so that legal proceedings might be dismissed, so the Government can keep their money and you folks keep your land?

A. Yes, we will be only too glad to keep the land.

Q. And did you authorize Mr. McCulloch and me to make that proposition to the Government agents?

A. Yes, I did. Do you want me to state about Del?

Q. Well, if you care to.

A. My son. Of course, he doesn't have any interest in the land, [21] but we work together, and he has bills to pay, and that is why his name was put on the contract. I wanted it drawn so that he could draw the money if anything happened to us,

(Testimony of Mary I. Hayes.)

so he could make this payment on the land he had bought.

Q. Was anything said about talking to an attorney at the time this was signed?

A. Not that I heard of.

Q. Now, was Mr. McCulloch your attorney in the damage case at the time you signed these papers?

A. He was. I never talked to you about it, but I have with him.

Q. Have you ever talked with Mr. McCulloch, either by letter or personally, concerning a settlement of the Tucker Act case?

A. Oh yes, about what he was to get.

Q. No, I mean—probably my questions are confusing you, but was Mr. McCulloch, were either of us, notified, so far as you know, that you and Mr. Hayes, your husband, were undertaking settlement of the damage case?

A. No sir, you wasn't.

Mr. Hicks: I think that is all.

Cross-Examination

Mr. Fuller: May I approach the witness?

Q. Mrs. Hayes, the first negotiations that you had on this, were they not made with Mr. Woodward? [22]

A. I don't think he was the first man there. No, Mr. Schaar came first.

Q. Do you know about when Mr. Schaar came first?

A. Well, I wouldn't know exactly, no, but I think—let's see, October,—it might have been the

(Testimony of Mary I. Hayes.)

last of August or along the forepart of September, somewhere along there.

Q. And at that time did he make an offer to you of what the Government would pay for the land?

A. He did. He offered us \$11,000.

Q. And at that time did you tell him that you wouldn't take that amount?

A. We always told him we wouldn't take it.

Q. Did you suggest an amount that you would take?

A. Well, some way in the compromise, I don't know just how, but they got around to those figures, as long as the Government was going to take it.

Q. But did you first ask for a larger amount?

A. Yes, \$25,000—\$25 an acre.

Q. Twenty-five dollars an acre, or approximately \$25,000?

A. Well, it would have been a little over that, wouldn't it?

Q. Well, a little more, or something like that.

A. Yes.

Q. After these negotiations had been carried on for some time, had you and Mr. Schaar—when I say you, I mean your husband and your son—and Mr. Schaar, representing the Government, [23] compromised on this sum of \$16,000 together with this five-year reservation which the contract provides for?

A. Sure we did, on the understanding that it would come to trial and the Government would get

(Testimony of Mary I. Hayes.)

it anyway, and we was trying to head off the expense.

Q. In other words, you compromised this in order to avoid going to trial, is that right?

A. Yes.

Q. And at that time you agreed that \$16,000 together with this five-year reservation for your use of the upland, together with Special Master Tract 48, was the sum to be paid to you, is that right?

A. Yes sir.

Q. Now, the contract was dated October 19, 1946, and I presume that is the——

A. October 9th.

Q. October 9th, 1946.

A. Well, I would say it was a month or six weeks before that, anyway, when Mr. Schaar came up there.

Q. Now, at the time that you signed this contract, you any your husband and son, you had already received this letter from Mr. McCulloch, had you not?

A. We had, but I didn't read it.

Q. It had been received by you?

A. Yes,—when we signed that? [24]

Q. When you signed this contract you had received——

A. Yes, it had been received and Mr. Schaar read it that day before we signed it.

Q. Up until court first convened here, approximately a month ago, when this matter came up, you were entirely satisfied until that time, were you not?

(Testimony of Mary I. Hayes.)

A. Well, we was never satisfied with the price, as far as that went, and Mr. Schaar knew that.

Q. That may be so. You had no intentions of repudiating the contract until that time, had you?

A. Well, in a way we had, because we never got our money.

Q. Do you know when the money was deposited in court?

A. Well, I found out afterwards it was the 11th of February, but we wasn't notified.

Q. Did you ask Mr. Donegan, an attorney here in Burns, to call me as to when you might receive the money?

A. Well, I don't know who he called first, but I know Mr. Hayes went down to see Mr. McCulloch about the money. When he got there Judge Fee wasn't in Portland, we couldn't get the money, and later then, it was either the last of June or the first week in July, I couldn't just say which, I think Mr. Donegan called you again, or the court, and they was going on a vacation, they wouldn't be back until the 25th of July, so that was all the satisfaction we got there.

Q. Who was going on a vacation? [25]

A. Well, I don't know who it was, the Court or whoever Mr. Donegan referred to, and he said if we could get there the next day we could have a settlement. Our car was in the garage and it was out of the question.

Q. If I remember aright, the Court was leaving on that day.

(Testimony of Mary I. Hayes.)

A. I supposed it was the Court. I don't know that they were leaving that day, but they were leaving the next day. If we didn't get there by noon, why, no use coming.

Q. The next day?

A. Yes, and this was in the evening.

Q. Did you say Mr. Hayes called on Mr. McCulloch for the purpose of obtaining this money?

A. They did. They went down there, but there wasn't any Judge. They went down to talk it over, anyway. We phoned down there to Mr. McCulloch and Mr. Hicks, and Mr. Hicks says, "Come on down, we will be glad to see you." The money proposition never was mentioned.

Q. When was that?

A. Well, that was the time we went down there. Well, that was before we went to California.

Q. Did they go down for the purpose of getting the money?

A. Well, they expected to if—no, I am mistaken about that date. It wasn't then. It was in April, because I was in the hospital at the time.

Q. April of this year? [26]

A. Yes.

Mr. Fuller: I believe that is all.

Mr. Hicks: I think that is all.

The Court: Just a moment. I understand that you were perfectly satisfied with this agreement if you had gotten your money at the time, is that it?

A. Under the circumstances that the Government was going to take it anyway. If the Govern-

(Testimony of Mrs. Mary I. Hayes.)

ment hadn't been involved in it we wouldn't have thought of selling it for that price, but since the Government had filed these papers or served these papers in the condemnation suit, why, we thought best to compromise, but Mr. Schaar knew that we felt we was selling far below the value, and we told him if we came to court we would ask a different price altogether from what we was compromising for.

The Court: But you understood perfectly that you were getting just so much money for the land, weren't you?

A. Yes, sir, the use of it. We was to get the money within two months, anyhow. When you have bills to meet, sometimes it is worth a little more to you.

The Court: Well, you didn't understand this contract that you signed to say that, though?

A. I didn't read that contract, I am sorry to say. Mr. Schaar knew all about it, and, as I tell you, if the Government will only give us our land back we will be happy.

The Court: Well, you have changed your mind about that, though? [27]

A. Since when?

The Court: Well, you have, haven't you?

A. I say, since when do you think I have changed my mind?

The Court: I am not telling you. I am asking you.

A. No, I haven't changed my mind.

(Testimony of Mrs. Mary I. Hayes.)

The Court: Well, it is certainly obvious that you have changed your mind, because you wouldn't have said that that money was satisfactory at the time and now turn around and try to turn back the written contract.

A. I said this way, it was satisfactory under the condition that the Government was taking it by law and we would have to go through court, and so we just compromised to keep out of court, and we thought we was losing the land anyway.

The Court: All right.

Mr. Hicks: No further questions.

A. Is that all?

Mr. Hicks: That is all, Mrs. Hayes.

(Witness excused.)

Mr. Hicks: Call Mr. Marcellus B. Hayes. [28]

MARCELLUS B. HAYES

one of the defendants herein, was thereupon produced as a witness in behalf of the defendants Hayes and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Q. Mr. Hayes, can you hear me all right?

A. Yes. Yes, fine.

Q. Mr. Hayes, this contract bears your signature and that of your wife. Do you understand what it is, Government's Exhibit 2?

(Testimony of Marcellus B. Hayes.)

A. Yes, sir.

Q. Now, will you tell the Court, Mr. Hayes, in your own way, the circumstances that led up to you and Mrs. Hayes, or you particularly, signing that agreement. Tell the Court the whole story, just as you understood it.

A. Well, it first started out that we were notified that our lands were going to be condemned, and it drifted along awhile, finally Mr. Schaar and the other attorney at different times came up there and visited the place and wanting to buy this land. In the drift of the conversation they said that they were in line for all the land around Malheur Lake, they wanted to straighten up the reservation, it wasn't our land but all the lands, they wanted all the lands, the Government wanted to own all of it so they could operate it, and it drifted along for [29] quite awhile, and we told them we had bought this land because we had use for it, we had used it all along, for years and years, and it wasn't for sale, and they impressed on us that it was only a matter of time until they would take it away from us at some time and the best thing to do was compromise, and finally Mr. Schaar came up there—I saw him here in town, and he wanted to know along what lines that I would settle on, and so on and so forth, and I made him some prices and he thought they was too high. It drifted along, and finally he offered us \$11,000 for the land. We told him we wouldn't think about that, it wasn't for sale at no price like that, and after a time I

(Testimony of Marcellus B. Hayes.)

told him that the land adjoining us on the west, the George land, was taken over, the deeded land at \$25 and the lake bed at ten, "But," I said, "We have got land there that we have acquired through possession, makes about—the land that we have got patented and the land that we got through having it in our field there forty-odd years makes a little better than a section of land," so we agreed on that at \$25, to take that part of it at \$25 an acre; and, "Well, when is this money going to be paid?" He said it would be paid within a month or two months. We talked the matter all over, and finally we got signed up along that line, and it drifted on until, now, almost a year ago, and we never got a dollar. They never notified us once that the money is down there deposited to our credit or that we could get it in any way. [30] We never got word from any of the officials or anyone that dealt with us, or anyone else, or the Court, as far as that is concerned. We called up at different times down there, and his Honor was back East; later than that had our attorneys down here, Pat Donegan, to call Mr. Hicks and McCulloch about a settlement, to get our money. "Fine and dandy, come down." When we got down there—and when we got down there it seemed like McCulloch was the man that took your place; he was on vacation. Well, Mr. Hicks called up, I think, every man that was up there connected with this case was qualified to settle the case and found that there wasn't. Well, it drifted on from then on, until, oh, I will say six weeks or two months ago,

(Testimony of Marcellus B. Hayes.)

had Pat call up again, and that was along in the afternoon, and he said, "Be here by noon tomorrow, probably we can settle it with you, but the Court is going on a vacation, he won't be here after that time." Well, we was busy, we knew we couldn't get it in that time, so we never have had a dollar out of it. I will take that back. I got a deal through the mail, it was a United States check, and away up in one corner of it it said "While alive". It didn't say anything about what it was for,—I don't know yet what it was for—but naturally I supposed it was to bind that contract. And that is the way it is at the present time.

Q. Now, Mr. Hayes, was that contract signed up on the same day that you first saw it? [31]

A. Oh, I don't know as it was. We was talking around for several days,—and there's one thing, this here damage suit, we never talked damage suit about nothing. Mac took that proposition himself, and it was going to go through court, and had an understanding what he was going to give us out of it, but when we signed up this contract it was on the land and upon rights down there and what the Government agreed to pay us.

Q. Well, didn't you read this contract?

A. Oh, yes, but I don't remember about deeding away any rights or assigning any interest in any rights in condemnation or any damage suit of any kind.

Q. Did you read it clear through, Mr. Hayes?

A. Oh, yes, I think I did.

(Testimony of Marcellus B. Hayes.)

Q. Did you ask any questions about it of anybody?

A. Well, I don't know as I did particularly, because I thought it was along the lines that we had agreed on, and that was satisfactory, we couldn't do any better; but, of course, what we impressed on these lawyers all the time is that this land wasn't for sale. Any person that would go down over the land now and see what preparation we have got there now would readily know that we wouldn't want to sell it.

Q. Did you realize when you signed those papers that the Government would get it at that price?

A. Oh, sure, but we thought by doing that that we would get [32] away from a condemnation. This here condemnation was hanging over it, and when you get into court you never know where you are going to get off at.

Q. Well, didn't you understand, or do you understand, that you still, if you want to avoid going through court, can take the money and let the Government have the land at the price stated in the agreement?

A. Well, it was a little more than sixteen thousand, they give us a five-year lease free,—that is embodied in the contract—and an option on the land if we wanted it. Of course, we would have to pay rental after five years, but the first five years we have the same privilege and the same rights we enjoy there at the present time and the sixteen

(Testimony of Marcellus B. Hayes.)

thousand, with an option on using this land as long as we wanted it.

Q. What I am getting at, Mr. Hayes, it is this, if I follow you correctly, you suggested you were willing to take the sixteen thousand and the five-years' use to avoid going through court under those circumstances? A. Yes sir.

The Court: If that is true, why are we here? Why have you changed your mind?

A. Well, the way it is now, the Government has the land and the sixteen thousand and the whole smear. We haven't got anything. They have never notified us that the money was there. We have heard through different friends once or twice that the [33] Hayes money was there, but they never wrote us a line.

Q. (By Mr. Hicks): Well, now, if you could get the money right away and draw it down from the court, would you want to take the money and let the Government have the land, as provided in that agreement?

A. Well, of course, a fellow would kind of want to live up to his word, but we have got a couple of attorneys in this matter and I would want to consult them about it.

Q. Now, Mr. Hayes, state whether or not Mr. McCulloch and I have always taken the position that you could do whatever you wanted to on this matter, that if you wanted the money, or if you wanted to have the contract in this matter, or any of that stuff that you could—have we left it up to

(Testimony of Marcellus B. Hayes.)

you and Mrs. Hayes, or have we tried to encourage you one way or the other?

A. Oh, you have been fair in the matter. I am not trying to indicate any dishonesty or any deal any place along the line, if we can only get our money, but the Government owes me something during the years that the receivership was there, '37, '38, '39 and '40, had a fair, square contract with them then, they owe me about seven hundred dollars on that and I have talked with different men about that and they said, "Well, get this amount straightened out, we will pay you." They can't take those cattle in there in our field and they can't take them out, and if I would compromise on this I wanted my seven hundred dollars on the grazing field too. Judge Fee here [34] appointed Dr. L. E. Hibbard Receiver there and they sent me a copy, and right at the last clause there whenever this land went through the court and they determined the owner of it, if it was the Government and the Government determined the rightful owner, the money would be refunded back to them, but the money is still down there.

Q. Now, Mr. Hayes, did you and Mrs. Hayes authorize me, as your attorney, to go to the Government people and ask them to keep their \$16,000 so you could keep your land?

A. Yes sir. They also asked me, at the time I was in Portland with Del, to go to the court there and compromise in some manner, get them to release the land, turn the money back and turn our property back to us.

(Testimony of Marcellus B. Hayes.)

Q. Now, you testified, I believe, that Mr. Schaar told you the Government was going to take your property anyway?

A. Under condemnation, yes sir.

Q. Did you believe that?

A. I did, for a fact, and I think they would have to.

Q. And was that one of the reasons why you signed the papers?

A. Well, it undoubtedly was, yes. Of course, we have been in court for years, went through all these local courts and the Supreme Court and the Court of Appeals, and a man that has never followed up these courts and paid the expenses, they don't hardly realize what they are, and I have had all the court I wanted. [35]

Mr. Hicks: I believe no further questions.

Cross-Examination

By Mr. Fuller:

Q. Mr. Hayes, if you could get your money in the next three or four days would you be satisfied?

A. All of it?

Q. All of it. Well, now, I am not talking about the receivership money.

A. When I get the sixteen thousand I want the seven hundred dollars too. That is just as honest as the sixteen thousand is and just as much of a contract.

Q. That was not part of this contract?

A. Oh, no no.

Q. Well now if you could get this sixteen thou-

(Testimony of Marcellus B. Hayes.)

sand within the next three or four days or whenever the Court gets back to Portland to make out a check would you be satisfied?

A. Huh, I would kind of like to talk it over with my wife. I believe I would, though.

Q. You believe you would?

A. If I don't have to go to court no more, but I want all my money; I want the seven hundred dollars—six hundred ninety-two dollars is what it is. But I want these other people to be satisfied. These people have been through court and worked for us all the time, and as long as they have held it up this [36] long, Mr. Hicks there and Mr. McCulloch put in years and years on this case, and I want him satisfied.

Q. I am still back to the same question. I have no control over the receivership money and I haven't all the control over the money in this case, or I haven't any control, but if the Court, upon proper showing here, will direct payment of the \$16,000 at this time, would you be satisfied?

A. Well, I couldn't say that I would. I would want to talk to my attorneys.

The Court: Well, now, just a moment. Is there any argument between you and these attorneys? Are you contesting their fee, like some of the rest of these people down there on the lake?

(At this point an unidentified lady in the audience interjected a remark which was not understood by the reporter.)

The Court: Just a moment. Are you contesting

(Testimony of Marcellus B. Hayes.)

the attorneys' fees, the way some of these people on the lake are? A. No sir, none whatever.

The Court: You are not?

A. No. There is no question about our settlement, as far as I know.

The Court: Well, all right, I will ask the attorneys, have you any objections to their carrying out their contract?

Mr. Hicks: Not at all, your Honor, and I will take the stand—I mean I have objection. I leave it entirely up to [37] them, as I have on various occasions, for them to decide it; nor have we undertaken to urge it one way or the other.

The Court: All right. It is up to you, Mr. Hayes. Do you want to take this or don't you? That's the size of it. I will give you time to talk to your attorneys and your wife.

A. All right, Judge, that is fine.

The Court: And at the end of that time you make up your mind. A. I will let you know.

Mr. Hicks: The Court can sit in on the conference, as far as I am concerned.

The Court: Court is in recess.

(A recess was thereupon had, and thereafter proceedings herein before the Court and in the absence of a jury were resumed and continued as follows:)

The Witness: Do I have to swear again?

The Court: No.

(Testimony of Marcellus B. Hayes.)

Redirect Examination

By Mr. Hicks:

Q. Mr. Hayes, since the recess have you talked this matter over with Mrs. Hayes?

A. Yes sir.

Q. Now, do you want to keep your land or do you want that \$16,000 that is in court?—And you understand these cases [38] are sort of pending anyway. Now, what do you want to do about it?

A. Well, of course, given my choice, I would sooner have my land. I have got our setup and our land and our winter quarters and everything there, that's worth more to us than the sixteen thousand, and I figure that if the sixteen thousand is the best we can do I would sooner have that. We have several tons of hay down there now ready for the cattle to be turned in on, and the way the price of cattle and hay is that is no price for the property, but to say this is a matter of law, and the location of it, that is the only thing I was figuring on.

Q. The Court wants to know what you want to do about it.

A. You want a definite answer, do you, Judge?

The Court: Yes, I want a definite answer.

A. Well, would there be any show for us to keep this property and hold it all?

The Court: Well, as I understand it, you have been trying to get this money and you have been blaming it onto the Court that you didn't get the money. Actually, the money has been down there since the 10th of February, and I was present in

(Testimony of Marcellus B. Hayes.)

the jurisdiction from the first of May on, and I don't know why you didn't get it.

A. Well, I was never notified, of course, of the money being there, but, to give me the choice between the land and the sixteen thousand dollars, I would sooner have the land. [39]

The Court: Yes, I know now, but you once entered into a contract.

A. I understand that, too. Well, that is just the way I feel about the matter. Of course, if that contract is binding and you can hold me to it, why, you can't get away from it, but I would like to have—I just don't know what to say about it. Supposing they turned this back to me, could they turn around and condemn this land and take it away from me?

The Court: Yes, I don't think there is any question about that part of it, if the Government chose they could condemn any piece of land in the country if they had proper use for it.

A. Well, would you have authority to let us go on this land and let us operate it the way we have for the last forty years and let it rest the way it is now?

The Court: No, I haven't any such authority. I have only authority to decide proper questions that they put up to me, and you can't even give me an answer yourself.

A. Well, the only thing is, we signed this contract.

The Court: Yes; and I think since you have seen these other verdicts, and from the fact that

(Testimony of Marcellus B. Hayes.)

they turned this land back, that you think there is a different setup than there was at the time you signed the contract.

A. Oh, no, I know about the contract. We signed it, and I know why we signed it, and all that, but if I could get the land and let the money go I would take the land. [40]

The Court: Well, of course, you understand nobody can assure you how long you are going to keep it. The Government may file another condemnation case tomorrow, as far as that is concerned. You understand that?

A. That is putting me kind of on the spot. Well, don't you think there is any possibility of us holding this land at all?

The Court: I have no idea about it. I am not here to give you advice, Mr. Hayes.

A. Well, I am just—that is just my thinking, that is the way I feel about the matter, and, of course, if there is no such a thing as getting possession of the land again, why, I will have to abide by the contract, that is all.

Mr. Hicks: All right,—does the Court have any further questions from him?

The Court: No.

Mr. Hicks: That is all, Mr. Hayes, thank you,—oh, did you want to ask him questions?

Mr. Fuller: I might ask him some further questions.

Mr. Hicks: Oh, sure. I thought you were all through.

(Testimony of Marcellus B. Hayes.)

Recross-Examination

By Mr. Fuller:

Q. Mr. Hayes, I will ask you the same question now: Providing that you can get the \$16,000 together with the money that is in this receivership fund, within the next few days, would you now be satisfied? [41]

A. Well, I wouldn't be satisfied, particularly satisfied, but if that is the best that could be done, if that is the best settlement we can get at, why, of course, I would abide by it, but if you give me the choice what I would sooner do, I would sooner have the land. Anyone that goes down through that land and goes down and sees that herd of cattle and the way we have the winter setup there, they would say keep the land and the hay and everything else.

Q. Under this contract you would have the use of this land for the next five years without any charge, wouldn't you? A. Yes, sir.

Q. So you can use the hay and the pasture on there and run cattle on there for the next five years? A. Yes.

Q. At the time you signed the contract you were willing to go through with this contract, were you not? A. How is that?

Q. At the time you signed the contract, you and your wife and your son, you were willing to go through with the contract at that time, were you not?

A. Knew the nature of the contract?

(Testimony of Marcellus B. Hayes.)

Q. No; were you willing to go through with it at that time?

A. Well, under the circumstances, these papers, the condemnation papers, were hanging over us, and the idea was to get out of the court, get out of the way of them condemnation cases. [42]

Q. In other words, you wanted to compromise your claim with the Government for sixteen thousand together with this five-year reservation, is that right?

A. Well, we wanted to compromise. It wasn't because we wanted to do it. It was to get out of court.

Q. In other words, what you wanted to do with the Government was compromise this case for the amount the contract set forth at that time?

A. Yes, sir.

Q. And you never changed your mind about it until just when we first came down here this term of court, is that right?

A. Oh, no. As far as our minds, we never did want to sell the land, but as far as changing—

Q. But did you ask to repudiate the contract until that time? A. No, sir.

Q. And you would have accepted the money had proper application been made for the money at the time that you requested either Mr. Hicks or Mr. Donegan—if the money had been paid over to you, you would have accepted it, would you not?

A. We would at the time, yes.

Mr. Fuller: I believe that is all.

Mr. Hicks: That is all, Mr. Hayes.
(Witness excused.)

Mr. Hicks: We will call Mrs. Hayes. [43]

MARY I. HAYES

one of the defendants herein, was thereupon recalled as a witness in behalf of the defendants Hayes and, having previously been duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Hicks:

Q. Now, Mrs. Hayes, you know what this other contract is about now and what you want to do, do you? A. I do.

Q. Well, will you tell the Court, in your own way, now, what you would rather do?

A. I would rather have the land back.

Q. Do you or do you not want to be bound by that contract that you signed?

A. No, I don't want to be bound by it.

Q. You want your land back?

A. I want the land back. I would much rather have the land back.

Mr. Hicks: Does the Court have any questions?

The Court: Well, as a matter of fact, you did change your mind when you found that these verdicts came in and then the Government decided not to take the land, didn't you?

(Testimony of Mary I. Hayes.)

A. Well, as far as changing my mind, my mind has never changed. We never wanted to sell the land in the first place. [44]

The Court: Well, you signed the written contract.

A. We signed that, as I told you,—Mr. Schaar told us that the Government would get our land anyway; these condemnation cases had been filed, and of course we thought we were going to lose our land, and it doesn't seem to me that the Government went on as Mr. Schaar represented to us that they would. I think he misrepresented it, and I think I signed that contract under misrepresentation. That is the way I feel about it. If he had said, "If this land goes too high the Government will give it back to you, we wouldn't take it," well, we would have said there it goes, we wouldn't have signed anything. That is how that was. But he didn't explain that to us. I suppose he knew that.

The Court: Anyone want to examine?

Cross-Examination

By Mr. Fuller:

Q. This misrepresentation that you refer to, what you mean by that is that if the verdict went too high that you would not be bound by the contract, is that it?

A. No, sir, like them other cases here, if he had told us that, "If this goes too high and the jury brings in a verdict of too high you would get your land back, the Government wouldn't take it," we would have said, "Good enough."

(Testimony of Mary I. Hayes.)

Q. He didn't tell you that the Government wouldn't take it?

A. No, he didn't tell us that. [45]

Q. At that time did he know that the Government was going to dismiss these cases?

A. I don't know what he knew.

Mr. Fuller: I think that is all.

Mr. Hicks: No further questions.

(Witness excused.)

Mr. Hicks: Call Mr. Boylan for just a few questions. [46]

BERT C. BOYLAN

was thereupon produced as a witness in behalf of the defendants Hayes and having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Mr. Hicks: May I have the original file, your Honor?

Q. Mr. Boylan, you are one of the attorneys representing the United States in this particular condemnation proceeding? A. That is right.

Q. And did you or one of the attorneys in your office prepare a form of complaint, the original complaint, which was filed in this proceeding, Case No. 3124, United States vs. Bell Hayes and Marcus B. Hayes?

A. I believe Mr. Fuller prepared that complaint.

(Testimony of Bert C. Boylan.)

Q. Yes. Now, the United States Attorney's office had the jurisdiction in respect to the condemnation proceedings; is that correct, Mr. Boylan?

A. I am not—I assume that that is correct, although I am not just positive about it.

Q. Well, I mean you were in charge of the litigation that was pending?

A. The Lands Division was charged with the condemnation proceeding, and at the present time the Lands Division is a part of the United States Attorney's office.

Q. Yes, but this case was in the office of yourself and Mr. [47] Fuller, in Portland, and was being processed and prosecuted by you gentlemen in behalf of the Government, was it not?

A. That is right.

Q. Now, state whether or not, Mr. Boylan, for a period of approximately two years last past, at various times I did not protest to you concerning the practice of Mr. Schaar in talking to our clients in trying to arrange settlements with them without consultation with us?

A. You spoke to me on several occasions, I think once over the phone and possibly once or twice in person, and accused representatives of the Fish and Wildlife of what you said was improper procedure in attempting to secure a settlement of cases in agreement as to the price that would be paid for the land. That is true, you did, on a few occasions, make such statements to me.

Q. And did I, on or about the month of May

(Testimony of Bert C. Boylan.)

last year, have a meeting with you in which I discussed with you a session I had had with Mr. Tom Clark, the Attorney General of the United States, and particularly Mr. Edward J. Williams, I believe his name is, in Washington, who was then in charge of lands acquisition in behalf of the Attorney General?

A. I knew that you had made a trip to Washington, or at least you told me you were going, and later on sometimes, I don't remember the date, you told me that you had called on Tom Clark, the Attorney General, and also that you had had a talk with [48] J. Edward Williams, who was then, I believe, the acting head of the Lands Division.

Q. Did you advise, or you, Mr. Boylan, authorize Mr. Schaar to settle anything in connection with this pending lawsuit and the other case pending under the Tucker Act? A. No.

Q. To your knowledge, there was a case between the same parties, that is, the Hayeses as plaintiffs and the United States as defendant, under the Tucker Act, which was then pending?

A. I believe there is such a case, yes.

Q. And you had not authorized, as I understand, Mr. Schaar to take any steps to settle that case? A. No.

Q. And you had not authorized Mr. Schaar, or yourself or your office, so far as you know, to contact the clients and to arrange terms of settlement pending lawsuit? A. No.

Mr. Hicks: I think that is all, your Honor.

(Testimony of Bert C. Boylan.)

A. Is that all, Mr. Hicks?

Mr. Hicks: I would like to offer at this time the original complaint in condemnation, and also the last amended complaint and the reply, as exhibits. It may be they are in the record anyway, your Honor. I would like to have leave to substitute copies for the originals, if they may be received in that form.

The Court: Yes. You don't need to mark them, but you may [49] note them.

(The documents referred to are here designated in this transcript as follows:

(Complaint in Condemnation in the instant case, Civil No. 3124, filed April 22, 1946, is designated received as Defendants' Exhibit 4;

(Second Amended Complaint in Condemnation in the instant cause, Civil No. 3124, filed February 13, 1947, is designated in this transcript received as Defendants' Exhibit 5; and

(Reply to Answer of Defendants Bell Hayes and Marcellus B. Hayes in the instant cause, Civil No. 3124, filed September 11, 1947, is designated in this transcript received as Defendants' Exhibit 6.)

Mr. Hicks: That is all, Mr. Boylan, thank you.

(Witness excused.)

Mr. Hicks: That is all, your Honor. [50]

Mr. Fuller: Call Mr. Woodward.

DOREN E. WOODWARD

was thereupon produced as a witness in behalf of the plaintiff herein and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fuller:

Q. Mr. Woodward, by whom are you employed?

A. By the Fish and Wildlife Service of the United States Department of the Interior.

Q. And here in Oregon?

A. I headquarter in Oregon, yes.

Q. Are you acquainted with Mr. and Mrs. Hayes that have just been on the stand here?

A. Yes sir.

Q. Did you at any time have any negotiations with them relative to the settlement of the claim for their lands?

A. Yes sir.

Q. When were those negotiations first carried on, if you know?

A. I don't know for sure when the first negotiations were carried on. I undertook them personally in the late summer of 1946.

Q. Where did these negotiations take place?

A. At the Hayes residence, north and a little west of Burns here. [51]

Q. What took place, just in your own words explain what went on, at this first conference, if you remember?

A. Well, I had gone to the farm to contact Mr. and Mrs. Hayes and their son, and, as I recall, I

(Testimony of Doren E. Woodward.)

arrived there about four o'clock and they were all absent, one of the men there, Mr. Don Otley, said they would be back shortly. So I sat there in the yard and talked to Mr. Otley until they returned, which, as I recall, was around five, and we went into the house and discussed the Hayes land at considerable length. The fact that there was a condemnation action pending against the land was discussed, and I indicated that that suit showed the intention of the Government to acquire the title. We discussed the possibility of compromising a settlement, in order that a lawsuit could be avoided, that is, the cost and time of a court action. As I remember, their original asking price was around \$21,000 and I offered them, I believe, \$12,500, and we discussed it further solely from the standpoint of "Can we compromise our difficulties and settle the entire situation on the lake?" And we eventually arrived at a compromise figure of \$16,000 in cash and five-years use of the Special Master or Lake bed Parcel 48 and the upland. It was agreed that I did not have authority at that time to accept such a compromise, and they wanted to discuss it with their attorneys. Then I left shortly after, with the understanding that they would write to Mr. Hicks and McCulloch and I would write to our Chicago [52] or central office and see if those terms were acceptable to them, and shortly before I left the house I indicated to them that we would like in that settlement to include the claims under the Tucker Act so that we could clear up all phases of our troubles on Mal-

(Testimony of Doren E. Woodward.)

hour Lake and square the thing away, and they indicated that was satisfactory, that when they were through with it they were through with it. I believe that I telephoned Chicago as to the results of that conference, but in any event, approval was granted to settle on those terms, and, since Mr. Schaar was coming into Central Oregon on other business, he took over getting the actual execution of the agreement with the Hayeses.

Q. You had no further dealings with them after that time?

A. Yes,—not personally, but when the agreement first came in I was not satisfied with the precise wording of the reservation of the five-years use. I felt that it might lead eventually to difficulties from misunderstandings, —while the Hayeses and ourselves and Mr. Schaar understood each other, we couldn't be sure that everybody would be around five years,—so it was reworded and the original agreement was sent back to Mr. Schaar and he was requested to contact the Hayeses and get them to initial the revised pages, which he did, and it was returned and sent to the central office in Chicago.

Q. That was revising the special provisions?

A. It clarified them. It didn't expand them any.

Q. Did you have any further dealings? Did you have anything to do with the signing of it?

A. I was not present when it was executed, no.

Mr. Fuller: I believe that is all.

(Testimony of Doren E. Woodward.)

Cross-Examination

By Mr. Hicks:

Q. Now, Mr. Woodward, does Mr. Schaar work under your directions? A. Yes sir.

Q. Are you sort of top man in that setup?

A. I am so designated, yes.

Q. I want to ask you, Mr. Woodward, whether or not Mr. Schaar had authority to tell the Hayeses that the United States was going to acquire this land in any event and that if they did not settle with the Government the Government would condemn and acquire the lands?

A. In my opinion, Mr. Schaar would never make such a statement.

Q. I am asking you whether or not he had authority to make that statement?

A. He had no such authority and he well knows it.

The Court: That has been the Government's position for twenty years, hasn't it?

A. Yes sir. They are very strict on that.

Q. (By Mr. Hicks): Now, Mr. Woodward, you yourself knew that Mr. McCulloch and I had been representing these people for [54] about—well, I for about seven or eight years, Mr. McCulloch for about ten, did you not, in all this litigation?

A. I knew that you had represented the lake bed owners in the U. S. versus Otley 1601 case.

Q. Yes; and didn't you know that we were representing the Hayeses?

A. I had no specific information that you were

(Testimony of Doren E. Woodward.)

going to represent them here. There had been no answer filed, in so far as I knew.

Q. And that the Hayeses said they wanted to get in touch with me?

A. They wanted to discuss it with you, that is correct.

Q. So you did know that we were their attorneys at all times?

A. I repeat what I said before: We knew you represented them in the 1601 case, and they said they wanted to take it up with the attorneys, and we agreed to that.

Q. Did I understand that you said that you agreed that you would give these folks \$16,000 and five years' use of the land? Was that your statement?

A. I am not sure that I understand your question.

Q. In your direct testimony, as I understood it, you said you agreed you would pay them \$16,000 and give them five years' use of the land under this clause that you mention; is that right?

A. No, not all the land. That is important. It is Lake bed Tract 48 and the upland. [55]

Q. Well, it is the tract that is mentioned in these proceedings?

A. No sir, it does not include all of them.

Q. Well, the point I am getting at is that after you had agreed to the price and everything you said that just as you were leaving you said something about the Tucker Act cases.

(Testimony of Doren E. Woodward.)

A. Before I left, yes.

Q. And asked them if they would consider that in?

A. I told them I would like to include it and they did not object.

Q. And that was after all was settled as to the value that should be paid for the land?

A. That was a compromise.

Q. And you mentioned that to them just as you were leaving?

A. Well, I don't think I was standing with my hand on the door, Mr. Hicks. As I recall, it was just before the negotiations broke up.

Q. Did you know that Mr. McCulloch and I were representing these parties on the Tucker Act cases?

A. I knew there was a Tucker Act case filed, yes.

Q. You knew that we were their attorneys in that case, didn't you?

A. I will say this, I understood that you and Mr. McCulloch had filed at suit. [56]

Q. Well, did you ever obtain authorization from the Attorney General of the United States or from any governmental official authorizing you to negotiate settlement of the pending lawsuit, to wit, the Tucker Act case?

A. No, it didn't occur to me that it was necessary.

Q. You didn't get any authority?

A. No sir.

Q. And, so far as you know, there never was

(Testimony of Doren E. Woodward.)

any authority given by the Attorney General's department or any other governmental agency for settlement of that pending lawsuit?

A. In so far as I know, no direct authority.

Q. Now, is this practice of settling lawsuits without regard to the attorneys who represent the clients, is that an established and recognized practice in your department?

A. We often—I don't say, perhaps not often, but occasionally reach an agreement with land owners who are represented by attorneys after a suit is filed.

Q. Either before or after? A. Yes.

Q. The pendency of the suit does not seem to make much difference about your settling with them? A. Not in all cases.

Q. And when you get them to agree to terms you usually handle the matter by wire so you can get them signed up pretty fast, is that right, Mr. Woodward? [57]

A. No, that is not correct.

Q. I understood you to say that you wired this one through, like you did the Dunn one?

A. I think in this case I telephoned.

Q. Oh, you telephoned. That is even faster than wire. A. Well, it is more satisfactory.

Q. Did you get the authorization right away?

A. They asked me to present the facts and they would make a ruling.

Mr. Hicks: That is all.

Mr. Fuller: That is all.

(Witness excused.)

Mr. Fuller: Call Mr. Schaar. [58]

ROLAND SCHAAR

was thereupon produced as a witness in behalf of the plaintiff herein and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fuller:

Q. Mr Schaar, by whom are you employed?

A. By the Fish and Wildlife Service.

Q. In what capacity?

A. Land valuation **engineer**.

Q. Are you acquainted with Mr. and Mrs. Hayes, the parties of whom we are speaking here in this proceeding?

A. Yes, I know them.

Q. Did you have anything to do with the carrying out or negotiating of this contract we are talking about herē, this Government's Exhibit No. 2?

A. The only thing I did with it was have it prepared and then finally executed.

Q. You had it prepared?

A. Yes.

Q. And where was that prepared?

A. Prepared right here in Burns.

Q. And was it delivered to Mr. and Mrs. Hayes?

A. Oh yes, I delivered it personally.

(Testimony of Roland Schaar.)

Q. And did you discuss it with them at the time?

A. Why, yes, we went through it in detail, and Mr. Hayes [59] reviewed it, read it, Mrs. Hayes took the forms, and how carefully she read it I don't know, but at least she took them page by page; and their son Delbert also did the same; and we discussed the contract.

Q. Did they sign the contract at that particular time?

A. Now, let's see, I got out there, it must have been about six or seven in the morning,—it was rather early—and we discussed it. I imagine it was about ten o'clock before they signed the contract.

Q. You had nothing to do with the negotiating of the figure that is set forth in the contract, did you?

A. Not the one that was finally used in the contract that Mr. and Mrs. Hayes agreed to.

Q. Had you discussed a settlement with them at some other time?

A. Oh, yes, I had seen him before that time, talked to Mr. Hayes more than the others; and one other time I was out there with Mrs. Hayes there and told them what I thought it was worth.

Q. Who returned the contract to you, if it was returned to you?

A. It was sent back to me by Mr. Woodward. The reason for that was to clarify the wording—

Q. No, I mean after the Hayeses signed the con-

(Testimony of Roland Schaar.)

tract, who sent it back to you or how did you obtain possession of it again? [60]

A. Oh, I took it right with me, with Mr. Delbert Hayes, in to town with him.

Q. And he had it notarized?

A. Yes, and he had it notarized.

Q. After you got it was it sent to anybody for acceptance?

A. It was sent to our Portland office, to Mr. Woodward, for review and transmittal to our central office.

Mr. Fuller: That is all.

Cross-Examination

By Mr. Hicks:

Q. Mr. Schaar, state whether or not in this conversation or other conversations you had had with the Hayeses you told them that the Government was going to acquire this land in any event?

A. No, I didn't say it that way.

Q. You didn't say anything that even meant that or suggested that?

A. Oh, I did mention that the land was up for condemnation.

Q. And did you give them any advice there, Mr. Schaar? Did you give them any advice?

A. No, I don't recall giving them advice.

Q. Didn't you tell them it would be better for them to sign the papers?

A. Well, I don't recall as to telling them that.

Q. Did you tell them that they would be better

(Testimony of Roland Schaar.)

off, they had [61] better sign the papers, that the Government was going to get the land anyway?

A. No, that would not be up to me to say. That was up to them to make up their minds in selling.

Q. Now, you had negotiated with Mr. McCulloch previously on this land and other lands on Malheur Lake?

A. Well, I had never negotiated. What happened there, Mr. Dillard had suggested that I talk to Mr. McCulloch to find out about these Malheur Lake cases. Well, I did that and I wasn't there more than fifteen minutes and, as far as I was concerned, it was a little embarrassing.

Q. What do you mean?

A. Well, I could see within fifteen minutes that I was just getting one picture of it, one side of it, obviously the way Mr. McCulloch wanted me to see it.

Q. Well, you knew Mr. McCulloch was representing the Hayeses at the time you took the contract out there?

A. Oh, yes, they had been in touch with him. They had written to him.

Q. They showed you a letter they had gotten from him?

A. Yes.

Q. You read it?

A. I did.

Q. And you told them it was all right for them to go ahead and settle? [62]

A. Well, now, let's get that straight. No, I didn't.

Q. I am just asking you.

A. No, I didn't.

(Testimony of Roland Schaar.)

Q. What did you tell them after you read it?

A. Mr. Hayes—after I read it I sat there and thought a minute, and Mr. Hayes said, “Well, the way we interpret this thing is we shouldn’t go ahead and sell this thing,” and I said, “Well, Mr. Hayes, it is up to you to make up your own minds.”

Q. Those are about the exact words, aren’t they?

A. As near as I remember.

Mr. Hicks: No further questions.

Mr. Fuller: That is all.

The Court: Why didn’t you submit this contract to the attorneys for the parties?

A. Well, they told me that they were to settle with their attorneys.

The Court: No, but why, before you permitted them to sign such a contract as this, didn’t you submit it to their attorneys? You knew that they were represented.

A. Well, I supposed it was all right, since Mr. and Mrs. Hayes and their son had agreed to it.

The Court: You didn’t know that that would be unethical if you were dealing for a private party, did you?

A. No, I hadn’t any intention to be unethical.

The Court: Well, you just didn’t know that it was unethical, is that it?

A. Well, I didn’t look at it that way, your Honor.

The Court: Do you mean to say that when you know that people are represented by lawyers in a

(Testimony of Roland Schaar.)

lawsuit you do not feel that there is any necessity of dealing with a lawyer instead of the client?

A. Well, I will answer it this way, your Honor, that they had been in touch with their attorney and that they felt that it was all right to go ahead and do that.

The Court: Yes; but then do you submit to them and let them on their own hook sign up the written contract, they having explained it to their attorney to your knowledge, settling the lawsuit, settling two lawsuits, both pending in court? You don't think that is unethical?

A. Well, at that time I didn't, your Honor.

Mr. Hicks: I would like to ask him one other question—Are you through?

The Court: All right.

Q. (By Mr. Hicks): Mr. Schaar, you knew the condemnation case was pending, did you, in Portland at the time you signed these folks up?

A. There were papers out for condemnation.

Q. And you understood Mr. Fuller and Mr. Boylan were representing the Government in that proceeding? [64]

A. Yes.

Q. And you did not consult with them and get authorization to settle this matter with these people without consulting us, did you?

A. I didn't talk to them, no.

Q. And the same with the Tucker Act case, which you knew all about, is that right? You just went ahead on your own, without——

(Testimony of Roland Schaar.)

A. Well, I didn't make this deal. This wasn't my deal. I didn't make the deal. All I did was, I went back there and got the form and had them signed up.

The Court: Well, the contract was signed up the same day that you took it out there, wasn't it?

A. That is right, but I mean the preliminaries, the terms, were reached before I went back there.

Q. (By Mr. Hicks): But the contract was prepared in Burns the day before you took it out there, was it not? A. That is right.

Q. And the next day you took it out and signed them up on the one session, is that right?

A. Oh, there was only one session as far as the signing was concerned, there was only the one session on the signing.

Q. Did these elderly people ask you any questions concerning that contract before they signed?

A. Oh, yes, as far as I remember, they did.

Q. Do you remember one single question they asked you about? [65]

A. I believe they asked me about the reservation, about the wording of it, as they wanted it understood in such a way. We discussed that.

Q. That was in respect to the manner in which the contract itself was written, is that right?

A. That is right.

Q. Now, one other question: Your main office is in Portland, isn't it? A. That is right.

Q. You spend most of your time in Portland?

A. Oh, I don't know, I wouldn't say most of the time.

(Testimony of Roland Schaar.)

Q. Well, you spent probably fifty percent of your time in Portland, and were in and out of there the whole while while there negotiations were under-way, weren't you, Mr. Schaar?

A. Well, not a great deal, but there—there are six states in this region that we have to cover, too.

Q. And your office there in Portland is in the Weatherly Building? A. Yes.

Q. That is about a mile from the Yeon Building, where Mr. McCulloch and I have our offices?

A. Yes sir.

Mr. Hicks: I have no further questions.

Mr. Fuller: That is all.

(Witness excused.) [66]

Mr. Fuller: That is the Government's case, your Honor.

The Court: Well, there is a neat balance here. As far as the Court is concerned, I think these people have unquestionably changed their minds, notwithstanding their testimony. I think they were perfectly well satisfied and would have taken this money and accepted this contract at any time up until the first verdict came in in these cases, then they thought that there was a chance to capitalize on them, and that is their status. But it is true that the Government repudiated the first verdict in the cases and thereby changed the whole course of the proceedings, because the Government has promised these land owners, has promised this Court, on record and privately, for a good many years, that they were going to take this land without any question,

and for a long time this Court tried, by suggestions in open court, to have the Government file declarations of taking. But the Government did not do that, and the Court on several occasions has considered the question of whether the Court would not order the dismissal of these cases if declarations of taking were not filed.

Now, this proceeding in this case, the signing of this contract, does repudiate the whole basis that the Government has gone on for a good many years, and, whether these agents of the Government directly promised these people or not or represented for the Government that the Government was going to take this land in spite of everything, I think that the [67] representation was made by the circumstances and by what had been said in court and out of court for a good many years. I am not casting any blame on the attorneys for the Government who are presently representing it, but the Department does have some responsibility and there are some people in the Department who have been cognizant of this situation all the time that I have. So I think that that representation was made and I don't think it was carried out, and I think it was one on which they have some right to rely. That is the first one.

Then, in the second place, I think that the action of the agents of the Government is entirely and absolutely unethical. The Court would not permit the agents of an insurance company to go around and negotiate a settlement behind the back of attorneys who were employed to represent plaintiffs, and I

think that the same type of ethics prevails in the trial of litigation in which the Government is involved.

Now, this situation is entirely different from the one that was tried the other day, because here there is no question about the fact that this condemnation case was sued and the Government was fully cognizant, as everybody else in this situation was, that McCulloch and Hicks were presenting these people, and there can't be any doubt about it, and if they hadn't known it before they knew it at the time they asked to consult Mr. McCulloch about it. Mr. McCulloch's letter is definitely against it, although he doesn't say that they can't [68] do it,—of course you don't say that to your client—but, obviously enough, it seems to me that he was expecting to receive some notification from these people and perhaps have a chance to see the contract, and the contract settles not only this litigation but settles another case.

I don't think it is possible that any court is going to allow that sort of thing to be carried along in a situation of this sort. I absolutely exonerate the Special Assistants to the United States Attorney, because the testimony clearly shows that they were not involved in any way, but the agents of the Government who negotiated this settlement are absolutely bound by the same limitations as were the Special Assistants to the United States Attorney, except that they are not attorneys of this court. If they were I would put them before a discipline committee promptly.

So the only thing the Court can do now is to restore the status quo. That is what I am going to do. I will not present this contract to the jury as a measure of the damages in this case. Now, I couple that with an offer upon the part of the Court to set aside the Declaration of Taking, because the Declaration of Taking is an integral part of this transaction and was not filed, I understand, until they had the contract, which set the price, so, therefore, if the Government makes the motion I will set aside the Declaration of Taking. [69]

Mr. Hicks: Could I propound a question, your Honor?

The Court: Yes.

Mr. Hicks: If the Declaration of Taking is set aside, then could it be understood that if the trial proceeds, if we have to try the question out, that the Government should do so upon either this Declaration or another one, so that we won't have the same thing happen here as did in the previous cases?

The Court: Well, I am no seer with the crystal ball. I have no idea what the Government is going to do and I am not going to answer questions in advance.

Mr. Boylan: May it please the Court, at this time we would like an exception to the ruling of the Court on the contract, and, as far as a motion for the purpose of setting aside the Declaration of Taking is concerned, I am not authorized to make such a motion. I will do this: Tomorrow morning early I will call the Attorney General, apprise him of the situation, and ask him for instructions as to that

matter, but I feel at this time that I am authorized to make such a——

The Court: Well, this is a preliminary trial and, as far as the Court is concerned, this may not be necessarily a definite ruling, but if you offer the contract tomorrow before this jury I am going to take what measures are necessary then to say what will be the conclusion of the Court, and I give you warning of what it will be. I think probably this is not [70] conclusive at this time, but I think it will be raised on a condemnation suit whenever you offer the contract as setting a measure of value. But you may have an exception in so far as it is necessary at this time, and otherwise than this the case will go to trial, and if the Declaration of Taking is not set aside then the verdict will be binding, because if I start to try this case on this Declaration I will consider the verdict is an absolute carrying out of the intention of the Government to take the land. In other words, if you leave that Declaration of Taking standing, in the face of this ruling, I will consider the judgment final, whatever the amount is that is set by the jury.

Mr. Boylan: You Honor, might I stress that I don't know just how early I can get hold of the Attorney General. I will try just as soon as the telephone office is open in the morning, and in case I don't get him by nine o'clock I would like to have a little time in which to try to get him before starting in the trial.

The Court: I will try not to embarrass you, Mr. Boylan. Of course, this case is set for trial and I

have to regard my situation as I can. I have some other things to do in the morning, that is true.

Mr. Hicks: There will be no way of setting this one over for trial until Friday, so we can have a chance to find out, your Honor? [71]

The Court: Mr. Hicks, you already have one set for Friday.

Mr. Hicks: I know it.

The Court: And this case is set for trial and I think the thing to do is to try it tomorrow, that is what I think, and then everybody that is present in Donnybrook will probably have a sore head.

Court is now in adjournment until tomorrow morning at nine o'clock—oh, just a moment. You have one other proceeding that you want to take up. Can you try that out this evening?

Mr. Hicks: If we are going to try that out, I assume that it can be tried out this evening.

The Court: All right, court is now in adjournment until 7:30. Recess until 7:30.

(Whereupon, at 5:35 o'clock p. m., Wednesday, September 24, 1947, a recess was had until 7:30 p. m.)

EVENING SESSION — 7:30 P. M.

Mr. Fuller: If the Court please, before proceeding with this next case, I would like to make a statement in the Hayes case, especially in view of the criticism that was addressed to the members of the Fish and Wildlife Service, and the idea is that probably the criticism is partially the result of the

advice that I gave them, but I would like to make a statement.

The Court: Yes. [72]

Mr. Fuller: This contract was signed on October 9, 1946,—at least, that is the date here—and one of the sections in the contract is number 9:

“By this agreement or contract the venders hereby agree to divest themselves of all right, title or interest to said land including any claim, or compensation for damage or right they might have under and by virtue of what is known as the ‘Tucker Act.’ ”

That is in the contract dated October 9, 1946.

On January 13, 1947, in answer to a letter addressed to our Department dated December 27, 1946,—I am sorry I haven’t got the original inquiry or that letter—I made this answer:

This is addressed to Mr. Doren E. Woodward, Regional Supervisor, Division of Lands, Department of the Interior, Fish & Wildlife Service, 600 Weatherly Building, Portland 14, Oregon.

“Dear Mr. Woodward: In Re: U. S. vs. Bell Hayes, et al, Civil No. 3124, Tract 17, Malheur National Wildlife Refuge, Harney County, Oregon.

“Reference is made to your letter of December 27, 1946 wherein you call our attention to Section 9 of the agreement covering the purchase of Parcel 17, Malheur Lake. Section 9 reads as follows:

“‘By this agreement or contract the venders hereby [73] agree to divest themselves of all right, title or interest to said land, including any claim or compensation for damages or right they might have

under and by virtue of what is known as the 'Tucker Act'.

"Under the Oregon Law, Section 67-1601 O.C.L.A., an attorney has a lien for his compensation, whether especially agreed upon or implied, upon actions, suits and proceedings after the commencement thereof, and judgments, decrees, orders and awards entered therein in his client's favor and the proceeds thereof in whosoever hands they may be or come to the extent of the fees and compensation especially agreed upon with his client, if there be such an agreement, and if not for the reasonable value of his services, and such lien shall not be affected by any settlement between the parties to the action, suit or proceeding before or after judgment, decree, order or award.

"In the case of *Snow vs. Beard*, 82 Ore. 518, on page 530, the Supreme Court of Oregon says:

" 'The right of a client to compromise a suit or action without the knowledge or consent of his attorney, and even against his protest, is settled by our adjudications, *Jackson vs. Stearns*, 48 Ore. 25, *Jackson vs. Stearns*, 58 Ore. 57, notwithstanding the existence of such right which cannot be wrongfully exercised so as to deprive the attorney of his compensation.'

"In view of the above opinion of the Oregon Supreme [74] Court it would be my opinion that a client could also dismiss a proceeding without the consent of his attorney. In view of the section of the Oregon Law above set forth and the opinion above quoted, it would appear that as between the attor-

ney and client the attorney would have a claim for his compensation. However, the claim of the attorney would be against his client and not against the Government in the case under discussion.

“It is my opinion that Marcellus B. Hayes and Mary I. Hayes, his wife, and Adelbert M. Hayes would have a right to request the dismissal of the Tucker Act case heretofore filed. However, in the event that they fail to do so, or in the event they fail to request their attorneys to dismiss the case, that they would be estopped from claiming any rights under the Tucker Act by virtue of their signing the agreement wherein they divest themselves of all right, title or interest in and to the land involved, including any claim or compensation for damages or rights which they might have under and by virtue of the Tucker Act.

“Trusting that above answers your inquiry I am

“Your very truly, Henry L. Hess, United States Attorney, by Linus M. Fuller, Special Assistant to the United States Attorney.”

I am sorry I haven't the inquiry addressed to our department. That is an answer that I made to the Fish and Wildlife Service pursuant to the section 9 that is contained in that [75] agreement executed by the Hayeses on October 9, 1946.

I don't know what to say, but if there is any criticism I suppose that I am to be blamed. I admit that this letter was sent to them after the Hayes contract had been signed. It is possible that other contracts are signed pursuant to this letter, I don't know, but I want the Court to know the facts. I offer this in

evidence. This is a copy. I do not have the original.

The Court: Well, I don't think it is pertinent, Mr. Fuller. After all, the Court is not bound by your opinion and I am not bound by the opinion of the Supreme Court of the State of Oregon, ——

Mr. Fuller: I realize that, but ——

The Court: —— and your defense of what your clients do after they have done it is an entirely different thing from advising them before they do it, and if I found that you had advised them before they did it then I would have taken that matter up specially, but I take it that you were asked about a completed contract and what you thought they could do to justify it.

Mr. Fuller: In this case the contract was not completed.

The Court: That is true.

Mr. Fuller: But whether they relied upon contracts in other cases ——

The Court: I haven't any idea about that, and I don't care, [76] because I am dealing with a situation that I have before me, and I say that in this situation it was absolutely unethical for the Government of the United States or any of its agencies to try to compromise behind their attorneys without having people that had attorneys have them look over the contract before they signed it, and I say that deliberately and I want that included in any record that goes up in this case. I absolve you from any blame, because, after all, this was an executed contract.

Mr. Fuller: Well, in this case the contract was

signed October 9, 1946. The answer, which was unverified, was filed on October 2nd, 1946, seven days before. Now, it is true that an appearance was made in this case a week before, however, by an unverified answer. Of course, I presume they should have knowledge of Mr. Hicks and Mr. McCulloch representing them, if they filed the answer.

The Court: Now, there is no question about that, and there is no question but what everybody knew that they were representing them. I knew it, and everybody else knew it.

Mr. Fuller: That is true, but I just want to tell the Court the facts. I don't want you to think that I in any way went behind their backs, not intentionally at least. I just wanted you to know the facts.

The Court: I think I understand the facts, but, as I say, in regard to this, I understand you were not consulted before [77] this contract was entered into. Is that correct?

Mr. Fuller: As far as I can remember, that is the first that I had. Now, I am not swearing to that, because things happen, and I know there has been discussion referred to by Mr. Hicks and Mr. Boylan. That may have been referred to before or after, I can't say. Now, that was in answer to an inquiry addressed to our office, and that was after this contract was signed.

The Court: Now, I won't change my mind in the situation. I don't say that anything I have said there fits into what you have said, but if it does it will have to stand.

Mr. Fuller: I just want you to know.

Mr. Boylan: If the Court please, I might say, in that connection, that at the time I was on the witness stand I had no knowledge of this letter; I hadn't seen it or known that it was signed.

The Court: I think the situation is perfectly clear and all the facts have been developed and I have expressed myself fully and very forcibly on what I think about it. That is the size of it.

(Whereupon, at 7:40 o'clock p. m., Wednesday, September 24, 1947, the trial of the above-entitled cause was continued to 10:00 o'clock a. m., Thursday, September 25, 1947.) [78]

Thursday, September 25, 1947, at the hour of 10:30 o'clock a. m., the trial of the above-entitled cause was resumed, and in the presence and hearing of the court and jury, and continued as follows:

Mr. Hicks: Mr. McCulloch will make the opening statement, your Honor.

The Court: You may proceed.

Mr. McCulloch: * * * * * We claim that in this case these lands have another value, and we call that our duck-shooting value. These lands are being taken by the Government as a part of a bird reserve. Now, it has been frequently stated and publicly stated, and admitted by the Government even in the pleadings in this case, that as many as a million waterfowl feed upon Malheur Lake during the hunting season each year. Now, I haven't counted them, that's the Government's figures on it, and it may vary one or two each year, I don't know about that, but there is a large number of ducks and geese and other water-

fowl that have hatched out in the lakes of the North that each year move through to their winter feeding grounds in the South, and it is a well known fact, as stated by the Government experts, that this Malheur Lake is on a flyway of the immense flocks of geese and ducks that fly north and south, that every year about one percent, they state, of the entire waterfowl population of the United States passes over this flyway; that there's something more than a hundred [79] million ducks and geese in the United States, and more than a million of them pass through here and light on and feed on Malheur Lake.

Now, we own a part of that lake, as set up here. We state in our pleadings, and it is admitted by the Government in this case, so that there will be no evidence submitted you on that fact, that this is a flyway for ducks and geese, that many of them do come through here and light and feed upon the lake, and that it is an excellent hunting ground. We also state that it is a very valuable hunting ground.

Mr. Fuller: If the Court please, we are not admitting that at all.

Mr. McCulloch: I take it on that I was interrupted.

The Court: The Government say that they have not admitted the fact that this is a valuable hunting ground.

Mr. McCulloch: The pleadings admit it.

The Court: Well, the Government say that they do not.

Mr. McCulloch: Well, then I will stand cor-

rected on that and they may make their statement on it. That was my understanding of it.

The Court: It is not admitted by the Government. They will put on proof of that.

Mr. McCulloch: I don't want to make any statement that is not in the pleadings in this case. I can read the pleadings, if the Court wants me to. [80]

The Court: No. Go ahead.

Mr. McCulloch: All right. It is stated in the pleadings in this case and, I think, admitted by the Government's pleadings, that the Government for a number of years have been acquiring lands in and about Malheur Lake, Harney Lake and Blitzen Valley and other places adjoining here for a bird reserve, that people are excluded from hunting on that bird reserve, and for that reason our lands ——

The Court: Just a moment. That is not proper, Mr. McCulloch.

Mr. McCulloch: Well, then I beg the Court's pardon, but I say it is in the pleadings and they admit it.

The Court: Even so, the Court is going to instruct the jury that you can't add any values to this land by the fact that there has been a bird refuge constructed here upon these lands.

Mr. McCulloch: I don't believe the Court understands the point I am trying to make, and I would like to just make that and then I will conclude and not bother about that any longer. I attempted to set up in the pleadings in this case that our lands are valuable for duck-shooting purposes, and I attempted to state in the pleadings why, and I at-

tempted to state the reason why they are valuable is because there are no other shooting grounds in that vicinity.

The Court: That is right, ladies and gentlemen, and that is because the Government has established this bird refuge, but the fact that the Government has established this bird refuge and excludes everybody else does not give this land any special value because this land is being taken and made part of the bird refuge and that is going to cut off all the hunting rights.

Mr. McCulloch: I don't know as it would be proper or not, but I would like to reserve an exception to the ruling of the Court in excluding me from making a statement in accordance with the pleadings.

The Court: All right, you may have your exception.

Mr. McCulloch: In addition to the value of the Malheur Lake lands and of the Hayes lands particularly, as I have heretofore discussed to you, these lands have a further value which ordinary lands do not have, and I want to point that out to you. Malheur Lake, in addition to the other extraordinary things that I have pointed out, is an extraordinary place for muskrat to grow and thrive. *****

Mr. Fuller: (Opening statement on behalf of the Plaintiff.)

Mr. Boylan: May it please the Court, at this time I am offering in evidence Government's Exhibit No. 2.

Mr. Hicks: To which we object, your Honor, upon the basis of the record as already made in respect to the exhibit.

The Court: The exhibit will be excluded.

Mr. Boylan: May I have an exception? [82]

The Court: You may have an exception.

Mr. Boylan: I would like to make an offer of proof, your Honor, on that.

The Court: Ladies and gentlemen, you may be excused while the Government makes an offer.

(The jury was thereupon excused from the presence and hearing of the court and counsel and in their absence proceedings were had as follows:)

Mr. Boylan: If the Court please, at this time the Government offers to prove by competent evidence that on October 9, 1946 an offer, which is designated by the Government's Exhibit No. 2, to sell 1101.68 acres of land was made by the defendants Marcellus B. Hayes, Mary I. Hayes and Adelbert M. Hayes, as the owners of this land; that this offer was in writing and subscribed by these parties, and it provided that they offered to sell this tract of land for the sum of \$16,000, with a "reservation of the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of livestock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years" from the date of this instrument, October 9, 1946, "in accordance with rules and regulations of the Secretary of the Interior." That this offer to sell was based upon a valid consideration, expressed in

the offer; it particularly described the lands to be sold; it provided that the option as exemplified by this offer [83] should remain in effect for three months, in other words, be subject to acceptance by the Government within a period of three months.

We further offer to show by this instrument that prior to the expiration of the three months, to wit, upon December 16, 1946, this offer was accepted by the United States of America acting by and through J. A. Krug, Secretary of the Interior, by the Acting Director of the Fish and Wildlife Service—Mr. P. H. Johnson, Acting Director of the Fish and Wildlife Service.

This offer is in substance the plaintiff's pleading of estoppel to introduce any evidence or claim anything in excess of the consideration expressed in this agreement, that is, the sum of \$16,000, with the reservation.

We also in this exhibit have a copy, a signed copy, of a letter signed by P. H. Johnson, Acting Director of the Fish and Wildlife Service, dated December 16, 1946, in which he notifies Mr. M. B. Hayes, one of the defendants, Box 368, Burns, Oregon, that the offer contained in this option is accepted on that date by the United States and enclosing a copy of the purchase agreement as accepted.

Also a copy of a letter by Mr. O. H. Johnson, it is, instead of P. H.,—O. H. Johnson, Acting Director, to Mr. Adelbert M. Hayes, at the same address in Burns.

We are objecting to any testimony in excess of the [84] sum of \$16,000 as set out in this contract,

and we are asking that those objections to such testimony be carried to all such testimony without the necessity of making an objection at each time.

Mr. Hicks: May I note an objection to the offer, your Honor?

The Court: Yes.

Mr. Hicks: We interpose an objection to the acceptance of the offer of proof on the ground, first, that such testimony at this stage of the proceeding is incompetent, irrelevant and immaterial, and point out in that connection that at the request of Mr. Boylan, of Government counsel, the Court entertained all factual and legal questions applicable to the validity of the contract, that question is already now adjudicated, and I think the material contained in the offer of proof is already now contained in the record.

The Court: Do you desire any further consideration of the question, or do you desire that the record that has been previously taken up be incorporated as part of your offer of proof and the Court deal with it on that basis?

Mr. Boylan: Yes, I would ask that the testimony heretofore taken be included as part of the offer of proof.

The Court: On that basis, the Court will adhere to the previous ruling and exclude the document in all respects, that is, it won't be used in this case at all, because of the fact [85] that if you use it it would bear implications and the testimony which was taken by the Court would have to be repeated before the jury; therefore, the Court feels that it

is not a proper matter to be brought forth, since the Court has considered the question and believes that the contract was not properly obtained.

Likewise, I am a little at fault technically about the situation in this case. As I understand it, an offer in a declaration of taking should conform to the original complaint, and, as I understand it, this Declaration of Taking did not conform to the original complaint; it started to take the fee simple title, and, as I understand it, by Declaration of Taking which was filed February 11, 1947. The Second Amended Complaint was filed February 13, 1947. I don't know exactly what limitation that puts upon the matter, but I am inclined to think that this is not in conformity with the statute.

Mr. Boylan: May I have an exception to the ruling of the Court on the offer of proof?

The Court: Yes. The debate I have in my mind now is the question of what I should submit to the jury, whether I submit this tract as a whole without any reservation or submit the tract with the reservation.

Mr. Boylan: Well, if the Court please, the original complaint apparently just called for the taking of the fee simple title. That, however, was under the general law and not by [86] virtue of the Declaration of Taking Act, as I understand it. Then later a Declaration of Taking was filed in which the Government actually took a somewhat lesser estate, that is, the fee simple title with this reservation added to it. Now, if there had been an actual taking under the first complaint I agree with your Honor, but

there was no actual taking under the first complaint, because there was no —

The Court: As I understand the technicalities, the Declaration of Taking Act specifies that the declaration shall be filed for the estate which was outlined in the complaint.

Mr. Boylan: Well, I am not prepared to state on that, your Honor, at this time.

Mr. Hicks: It occurs to me, your Honor, that we may be able to eliminate some questions there by stipulation with counsel. I don't know. I realize that we can't stipulate jurisdiction in respect to pleading the statute, but I think we can work out out something that should eliminate one feature of it.

The Court: Well, all right. You may talk, if you want to. Court will be in recess.

(A short recess was had, after which the trial of the cause was resumed, in the presence and hearing of the Court and jury, as follows:)

ADELBERT M. HAYES

one of the defendants herein, was thereupon produced as a witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Q. Mr. Hayes, where do you reside?

A. Lawen, Burns.

Q. And where were you born?

A. Born at Lawen.

(Testimony of Adelbert M. Hayes.)

Q. And that is in Harney County, Oregon, is it?

A. Harney County, Oregon, yes.

Q. And where is that with reference to the tract of land described in the complaint here?

A. About six or seven miles due north of that tract of land.

Q. And where have you lived all of your life?

A. In the Harney Valley, right on that ranch and on this property.

Q. When did you first become familiar with the tract of land that we are concerned with?

A. About 1907.

Q. And how old were you at this time?

A. Well, I was about—I was born in '96. I was about eleven years old. [88]

Q. Yes. You have been down there ever since, is that right?

A. Been down there ever since, that is right.

Q. What is your occupation?

A. Farmer, stock raiser.

Q. And what is the main feature of your work? That is, farming, or cattle raising, or what is it?

A. Well, of course, they work together. I do lots of farming.

Q. And state whether or not you have operated this particular tract of land during the years in conjunction with your folks, with your father and your mother? A. I have.

Q. And you work with them and operate the place with them, do you?

A. That is right.

(Testimony of Adelbert M. Hayes.)

Q. Now, what kind of a plant have you there, Mr. Hayes, in conducting your cattle and farming operations?

A. Well, we have a plant that has been built up over a period of years. We have our summer range and our winter quarters. This particular tract of land is our winter quarters, the heart of our plant.

Q. You say you have a summer range. Do you have any rights under the so-called Taylor Grazing Act? A. We do.

Q. And that is connected with this tract of land, the deeded land, is it? [89]

A. Yes, sir.

Q. What is the procedure there as to the summer range and the winter range?

A. Well, in the spring of the year we turn the cattle onto our summer range, and then along after the range dries up we have other properties that we put them on first, but generally along in September we put them on the lake, on this property that we are talking about.

Q. Are you referring to the cattle that are operated by your mother and your father and yourself? A. That is right.

Q. And how many cattle have you been running the last number of years, Mr. Hayes?

A. We try to run right around five hundred cattle all the time.

Q. And where do you graze those cattle in the summertime? A. North of Burns.

(Testimony of Adelbert M. Hayes.)

Q. Including the Taylor Grazing land?

A. Yes, including the Taylor Grazing land.

Q. And when do you bring the cattle into this tract of land for grazing, what time of year?

A. We generally put them in there in September.

Q. And how long do they remain there on this tract for winter feeding?

A. Well, we generally leave them there from September right until the middle of February, until up in March. [90]

Q. Now, do those cattle just graze during that period you mention just on this particular tract of land? Do they just graze on this particular tract of land?

A. Yes, on this particular tract. We have a little lake land at the present time leased from the United States down there.

Q. Where is that with relation to this?

A. Due north.

Q. What I am getting at, Mr. Hayes, you say right at the moment you have a little extra land leased? A. Yes.

Q. Did you graze your cattle last winter partly on that land? A. Partly on that land.

Q. How much acreage is involved in that piece?

A. I don't know exactly. It is less than one hundred and sixty acres.

Q. Yes.

A. I would say probably one hundred and twenty or one hundred and thirty acres.

(Testimony of Adelbert M. Hayes.)

Q. Now, before you leased that part from the Government where did you graze these cattle for winter grazing? A. On our own land.

Q. And do you refer to the tract that we are concerned with here? This tract that is on the map?

A. That tract that is on the map, yes.

Q. The tract that is involved in this proceeding? [91] A. That is right.

Q. Now, how are these cattle fed? Do you cut hay down on the tract? A. We do.

Mr. Fuller: If the Court please, I think he is leading the witness. He can ask him how they are fed, not if he cuts hay.

The Court: That is right.

Q. (By Mr. Hicks): Well, tell us, then, Mr. Hayes, about the crops that are raised on this tract, if any.

A. Well, it is natural—we have a good many acres of natural meadow, natural grasses, and the past few years we have raised some wonderful grain crops in there.

Q. Now, would you be good enough to step down to the map and for the jury's information, point out the meadow land that you refer to and what the production is—Could we put the map up, your Honor, so the jury can see it? I don't know that they can?

The Court: Can you see the map from there?

A Juror: Not too good from here.

(The map was then moved.)

(Testimony of Adelbert M. Hayes.)

Q. (By Mr. Hicks): Mr. Hayes, you are familiar with the map which is Government's Exhibit 1, I believe? A. I am.

Q. Now, would you, with the pointer, or with this pen, point out to the jury the areas that are the meadow land and state [92] what has been produced on there from year to year, to your knowledge. Now, stand over there, if you want to, any way so they can see.

A. This is the road coming up the north part of the field right here. This is a portion of sagebrush land around this corner here. This is all natural meadow in here. This is a knoll here. This is natural meadow all along this side of that knoll. This portion of the land is in grain at the present time, and also this portion in here.

Q. Now, you are referring to the surveyed or deeded lands?

A. That is right, the deeded lands.

Q. And the lands above the meander line?

A. The lands above. This is the meander line here. All this portion along below the meander line adjacent to this part of the deeded land, that is all meadow; that is all cut and bunched at the present time. This portion of the lakebed lands, this is all cut and bunched hay at the present time. This portion of land along here, that's tules. I have raised wonderful crops of grain upon this land in years past. I have also raised grain on all this portion of the lakebed along in here and out through here. And there's tules, a few tules,

(Testimony of Adelbert M. Hayes.)

around in this portion of the lake right here. This corner here and all out in here is all cut and bunched hay at the present time.

Q. I want to ask you, Mr. Hayes,—I think you may resume the [93] stand now—approximately how many acres of meadow land are above the meander line on which you have produced the hay, as you have testified, from year to year?

A. Oh, I would say in the neighborhood of one hundred acres.

Q. And what kind of crops have you been getting down there?

A. Of course, climatic conditions had quite a bit to do with that, but ordinarily they are fine crops.

Q. Was there a period of dry years beginning back there somewhere? A. There was.

Q. Could you tell us, just roughly, what those years were?

A. Well, we had a series of years starting along about '28 when the lake commenced to dry up. Of course, our uplands didn't get any moisture; they weren't very productive. We followed that water down. Your grass grows as you follow the water out, and I have also planted grains on this water—ground that the water receded off of. In '29, I think, was the first year that I put any grain in down there. At the present time I don't suppose—it wasn't many acres; probably thirty-five or forty acres. In '30 I put in more acreage. In '31 I had in a large acreage of grain. That was a very dry

(Testimony of Adelbert M. Hayes.)

year. The lake completely dried up that year. In '32 I didn't have any grain. In '33 I had in probably two hundred acres of grain. '34 was another dry year when the complete lakebed was in grain. I had it in grain in '35, and the last [94] crop of grain up until this year that I raised upon the lake was in '36.

Q. Now, this grain that you grew during those dry years, where was that located with reference to the center line of the lake and the areas north of it?

A. Well, we had planted grain as far out as the center of the lake.

Q. Well, will you tell us with reference to the locations on the map the areas in which you have grown grain?

A. Well, it has been grown almost continuously from the meander line to the center of the lake, as far as our holdings go there.

Q. Now, state whether you have grown grain above the meander line?

A. Not too much. I have more grain above the meander line this year than I have ever had.

Q. Do you have a crop of grain growing down there now? A. I have.

Q. And is that on the lake land or on the deeded land? A. That is on the deeded land.

Q. Yes. About how many acres do you have there now?

A. I have around thirty-five or forty acres on our place.

(Testimony of Adelbert M. Hayes.)

Q. And what kind of a crop of grain is that? That is oats, isn't it?

A. That is oats, a little barley. [95]

Q. And what kind of a crop is it? What kind of a crop is it? I mean is it——

A. It is a fair crop.

Q. Yes.

A. Around sixty bushels to the acre, I imagine.

Q. Now, state whether or not in growing grain over these years that you testified to you have grown it in various locations throughout the tract, or has it been limited to certain specific areas?

A. That is right, different places on the—due to the conditions of the soil and washing conditions, why, naturally you pick the best spot to put your grain in.

Q. Have you ever made any effort at controlling the water down there up to this time, Mr. Hayes?

A. No.

Q. Now, referring back to the years that you testified to that you grew grain down there, I want you to tell the jury, in your own way, the kind of crops you got and the productivity of those grain crops that you mention. What were the crops?

A. Oh, we had a wonderful yield. It is very productive, and we had a wonderful yield, sixty, seventy, as high as a hundred bushels of oats to the acre.

Q. Would that oats be threshed or would——

A. That oats, the greater portion of it, was threshed. However, [96] I have stacked lots of

(Testimony of Adelbert M. Hayes.)

oat hay and rye hay down there to feed our cattle in the winter time.

Q. Now, to what extent have you been on this land from year to year from the time you were a boy?

A. Always been there during the haying season, and of course during the winter months I wasn't there so much, but we always had a man there. We have always had somebody there every winter, except perhaps maybe a few winters. I wouldn't know but what there is somebody down there every winter.

Q. Have you ever lived down there yourself?

A. I have. During those years I was farming so successfully down there I lived there all the time.

Q. Are you familiar with this entire tract?

A. I am.

Q. What do you say about the soil qualifications of the tract?

A. Wonderful. It is wonderful soil. The abundance of your crop proves that more than anything else. You will raise some wonderful crops there.

Q. Now, state how the soil varies from one part of the tract to the other, if you know. Does it have a common quality, or is there a difference?

A. Well, of course, there is some greasewood land there, some high land, there's salt grass and stuff that grows on it, that is not suitable for grain purposes, but all your low land there is suitable for agriculture, for grain purposes. [97]

(Testimony of Adelbert M. Hayes.)

Q. Now, aside from the question of water control, Mr. Hayes,—can you hear me?—Aside from the question of water control, what if any acreage in this tract of the lakebed land, to your knowledge, is not available for grain production?

A. The lakebed land is not available for grain production?

Q. Well, what parts of it, assuming the water control, what parts of it do not have capacity for producing grain?

A. The lakebed land, there isn't any portion of it that is not suitable for grain growing.

Q. On how many places throughout the lakebed land have you actually grown grain during the years you have testified?

A. Practically all of it at different times. Maybe not all the same years, but at different times.

Q. By that you mean at different places throughout the area?

A. Yes.

Q. Mr. Hayes, referring to this extreme northerly part, the part down near what you call the center of the lake, has grain been produced on that land as well?

A. That is very good soil, very good land.

Q. And have you produced grain on that at various times, or under what—

A. At times I have.

Q. How?

A. At times I have, yes.

Q. Now, that is the lower area, isn't it? [98]

A. That is the lower, out in the lakebed.

Q. Now, you have mentioned some hay produc-

(Testimony of Adelbert M. Hayes.)

tion on the meadow land. Will you tell us the quality of hay you get on that land, Mr. Hayes?

A. Well, we get what we call sugar grass and a wire grass, blue-joint. There's several different kinds of grasses that grow. It is a very good quality of hay for lake hay, a very good hay.

Q. In former years did you stack the hay?

A. Yes, we used to stack all the hay.

Q. And when did you discontinue the stacking of the hay?

A. Well, the last few years we haven't stacked the hay. We have been cutting it and bunching it, rake-bunch it.

Q. And is there any particular reason why you rake-bunch it instead of stacking it?

A. Well, because, for one thing, you get away from your cost of stacking it, also feeding it out, and cattle do just as well on it.

Q. Well, now, after the hay is cut, I want to ask you what if any pasture develops there? Will you describe that condition for us?

A. Yes, after your hay is cut you—those meadows grow up with green grass and it is a wonderful pasture along with your bunched hay.

Q. Well, can you describe the quality of that pasture a little [99] further, Mr. Hayes?

A. Well, naturally it is a finer texture pasture, it isn't coarse like if it had continued to grow in its former state, and it is green. The cattle thrive on it and do fine.

Q. Now, state whether or not in the normal year

(Testimony of Adelbert M. Hayes.)

the waters of the lake in the springtime come up and irrigate the land, the lakebed land?

A. Oh, the water?

Q. Yes.

A. It practically covers all the lowlands there, when years are normal, every spring, then as the summer comes on this water recedes, goes back, and then for years and years you could almost depend on what you are going to do down there each year. Of course, since they put the dike in the lake we don't get the—it doesn't dry up and go back like it used to.

Q. Well, as the lake recedes in the spring—as it recedes in the spring, what develops there, if anything, in the way of forage and the grasses?

A. Well, your grasses, naturally, those grasses, most of them, will grow in water. As the water recedes, why, it continues to grow.

Q. Are you familiar with the elevation of this tract, Mr. Hayes?

A. No, just where the water is, as far as figures are concerned, I am not.

Q. I want to ask you whether or not, after the water has receded [100] downwards on the tract, there is, to your knowledge, any sub-irrigation?

A. Oh, surely, the ground is wet, and as long as water is in that vicinity it naturally continues to sub out there and keep your soil moist.

Q. In the normal year, from your knowledge of this particular tract of land and these acres that produce the hay, what would be the production,

(Testimony of Adelbert M. Hayes.)

the average production, from year to year, of the hay of the quality you described?

A. Oh, a ton to a ton and a half to two tons to the acre.

Q. Now, getting back to the grain for a minute, I want to ask you, Mr. Hayes, how you farm the grain? By that I mean do you plow it?

A. I have plowed very little; generally disk and drill.

Q. And does that comprise the whole operation?

A. That comprises the whole operation.

Q. What do you say about the weather conditions on this tract, I mean the weather in that area, including this tract, as compared with other areas of Harney County, including Burns, in the immediately joining vicinity?

A. Well, in comparison to Burns it is a much milder place to winter cattle. You put your cattle down there, your calves are born in the wintertime, there is very seldom you ever lose calves down there. You have your protection of those tules. It is almost like raising cattle in the barn. [101]

Q. Does that have any particular advantage in the cattle-raising business, Mr. Hayes?

A. It certainly is.

Q. Now, what is the fact, from your knowledge of that lake back during the period of years, whether cattle have been able to graze there all winter without any hay?

A. That happens many winters.

(Testimony of Adelbert M. Hayes.)

Q. And have you yourself observed it many winters?

A. Our cattle have wintered there many winters without hay, a portion of them. I wouldn't say all of them have.

Q. Does the climatic condition have any bearing upon that situation?

A. Oh, to a certain extent. The condition of your cattle has more to do with that than anything else. You naturally leave your stouter cattle there.

Q. And state whether or not in your operation with your folks there have been times that you have fed hay during the years?

A. Oh, yes, we have fed hay for years down there.

Q. And when would you begin to feed your hay?

A. Oh, ordinarily, in the ordinary winter, we commence feeding hay down there along from the first of January to the middle of January.

Q. Now, can you tell the jury what time it is that the people up around Burns here begin feeding their cattle hay?

A. You see people feeding cattle up here from November on. [102]

Q. To a stock man is that any particular advantage?

A. It certainly is. It cuts down his operating costs a lot.

Q. It does what?

A. It cuts down his operating costs a lot, the condition of the cattle.

(Testimony of Adelbert M. Hayes.)

Q. Ever see any ducks and geese down on the lake, Mr. Hayes? A. Thousands of them.

Q. State whether or not that is a favorite ground for ducks and geese and waterfowl?

A. It is.

Mr. Boylan: Objected to as immaterial.

The Court: He may answer.

A. It seems it is a natural home for them.

Q. (By Mr. Hicks): Now, any muskrats down there on your property, Mr. Hayes?

A. There is.

Q. Tell the jury, in your own way, about the muskrat production as you have observed it on this particular property here?

A. Of course, muskrat production is a good deal like anything else, you have years that there are more muskrats than other years,—I suppose it is disease or something—but, from time to time, always it has generally been—well, generally there have been somebody camped there that trapped in the wintertime; they have trapped and looked after the cattle. Usually they trap and feed, feed in the forenoon and trap in the afternoon. [103] It was a natural thing to do.

Q. Can you tell us about some of the years' production of muskrats on this particular tract, Mr. Hayes?

A. Oh, it was over a period of years. I couldn't tell you as to the number of years.

Q. To look back on them, as to dry years when there weren't any muskrats?

(Testimony of Adelbert M. Hayes.)

A. I think that land was trapped 'most every year; in fact, every year.

Q. Now, have you been operating this property in active cooperation with your parents for all of these years? A. I have.

Q. And are operating it now?

A. That is right.

Q. Have you had any other winter quarters for grazing of cattle?

A. No, sir. We have other property around Lawen, but we winter cattle, put them through the winter, down there and then along when the break-up is we move them back to Lawen and finish down.

Mr. Hicks: You may take the witness.

Cross-Examination

By Mr. Fuller:

Q. Mr. Hayes, when you have muskrats down there you don't have much else in the way of grazing lands or grazing crops, [104] do you?

A. Yes, you do, because that portion of the lake that is lower, that lies out in what would be open water or tules. That is where the muskrats are. That doesn't affect your higher lands so much.

Q. I am talking about when you have muskrats you don't have grain growing, do you?

A. No, that is right

Q. And when you have grain you don't have muskrats, do you?

A. No, that is right, in the same land at the same time.

(Testimony of Adelbert M. Hayes.)

Q. You can't have both on the same land?

A. At the same time, no.

Q. Now, you have mentioned here that you run about five hundred head of cattle, is that right?

A. That is right.

Q. And you winter them on this land from September until the middle of February or March?

A. Somewheres around there, depending on the year.

Q. Now, in addition to this land that you own down there, what other land do you run these cattle on during the winter?

A. I have land three miles due west of the store at Lawen, on Silvies River.

Q. Do you run some of those five hundred head of cattle on that land?

A. No, sir, the cattle are summered north of Burns. [105]

Q. I am talking about the winter.

A. Oh, I misunderstood you.

Q. In the wintertime do you have any other land than this land under consideration here that you run that five hundred head of cattle on?

A. We have land there by Lawen.

Q. I don't know that you understand me. I am talking about land in the vicinity of the land under condemnation here. Do you run your cattle on that land and on any other land in the wintertime?

A. No, not consistently, no.

Q. You are leasing from the Government, aren't you, a tract of land?

(Testimony of Adelbert M. Hayes.)

A. Yes, a hundred—I don't know, this is the first year we have had it leased; it fit right into our setup there, it was easier to lease it than it was not to.

Q. And your cattle will run on that land?

A. They will.

Q. Now, this five hundred head of cattle, or whatever number you are running there, are they confined within fences on this particular tract of land?

A. They were for a period of years, yes. The last, up until—well, I would say the fence has been in poor repair up until, last winter, we repaired the fences between the Government land and our land.

Q. And when the fences were in poor repair the cattle grazed all over the lakebed, didn't they?

A. Well, not all over the lakebed.

Q. All in that area down there?

A. In that particular area down there, but that hasn't only been for over just a small period of years. It hasn't been for any length of time.

Q. For how long a period of time?

A. Well, I would say for the last—probably, maybe the fence has been down for three or four years, up until last winter.

Q. So for several years before last winter the cattle have grazed all over the land in that vicinity?

A. That particular area, yes. They didn't graze too far.

Q. Go off this land?

A. Yes, but the river channel there made quite

(Testimony of Adelbert M. Hayes.)

a line. They didn't go east of that—and they didn't go west of it at all.

Q. Isn't it a fact that the dust and the sand—the wind would blow that up along the fence posts for years and they would walk right over the fence?

A. That has been repaired, though, but during the time when that condition existed in that particular area there wasn't much grazing and we built the fences up on top of those levees all during that time up until the time that the Government acquired this land from our neighbors.

Q. Well, there was a period of time that there wasn't any [107] grazing down there on the lakebed; it was just too dusty, wasn't it?

A. No, sir, we never have had that condition.

Q. What blew up and covered the fences?

A. That was up on the higher land. There was tumbleweed would drift up against the fences and then the dirt would drift over it; but down in the lakebed——

Q. That dirt that blew up there, that was some of this fertile soil, wasn't it, that was blown?

A. That is right.

Q. Blew up on these fences?

A. That is right.

Q. Now, you said for the past few years you have been growing grain crops. For how many years past have you been growing grain, including this year?

A. Well, I would say—of course, you have to count on——

(Testimony of Adelbert M. Hayes.)

Q. Did you grow any grain there last year on this land?

A. We did not. I think up until this year the last crop of grain I raised on the lake was either '36 or '37.

Q. Then when you said that for the past few years you have been growing grain crops that isn't so?

A. I didn't remember saying that.

Q. I understood you to say that for the past few years you had grown grain crops on this land.

A. I am trying to confine myself to the truth, as far as I [108] remember.

Q. Then this is the first year since 1936 or '37 you have raised grain on this tract?

A. That is right.

Q. How many acres do you have in grain this year?

A. On this particular tract, I would say about thirty-five acres.

Q. Can you show on the map where that grain is growing?

A. It is in what we call the west forty, starting at the point about here; I would say it comes around and goes back into about here, in that particular area in there; then, over here, I would say that portion of the land in there (indicating).

Q. What is the condition of that grain crop at the present time?

A. What did you say?

Q. What is the condition of that grain crop at the present time?

A. Very good.

Q. Very good. Oh, I meant to ask you—while

(Testimony of Adelbert M. Hayes.)

you were at the map you pointed out a knoll here. I believe that that was the one that you referred to (indicating). A. That is right.

Q. What is growing on that knoll?

A. Greasewood, salt grass.

Q. Is that about eighty acres? [109]

A. I would say around seventy or eighty acres.

Q. Seventy or eighty acres. So on this upland now you have about seventy or eighty acres of greasewood and, you say, about thirty-five to forty acres of grain, is that right?

A. That is right.

Q. What else is growing on that?

A. Natural meadow. The rest of it is in natural meadow.

Q. That is along the meander fence, is it not?

A. And some in that north field, there is some natural meadow.

Q. Now, below the meander line you have some hay cut there at the present time, haven't you?

A. I have.

Q. There's a great deal of tules mixed in with that hay, isn't there?

A. Well, not in the greater portion of it. There's places where tules have been cut with the hay. That is the way we weed out the tules down in there. When you see sign of other grass you cut it and the tules are cut.

Q. Along the east border of the property there is quite a bit of tules?

A. There is, but if you examine that closely you

(Testimony of Adelbert M. Hayes.)

will see that there is good grass growing all through those tules. Of course, the tules predominate now, it looks to you.

Q. At the present time are you able to go beyond where your hay is cut to the center of the lake? [110] A. No.

Q. Why not?

A. This country has all been under water. The water has just receded off of this during the last month or so and it is bare.

Q. How long has it been since it receded off of this land up here?

A. Well, I couldn't tell you exactly. There was water in this portion of the lake right here—no, right in here it is—this spring. When I went back down there to hay that was all dried up. Some time between when I was planting grain and I went back to hay the water has dried up down in there.

Q. Right in here, there are tules down in there (indicating)?

A. No; right in here there's some tules, in there (indicating).

Q. Principally that?

A. No, not principally that. You can grow grain on that if you want to.

Q. Did you grow grain on there this year?

A. No, but it surely can be grown on there.

Q. You haven't grown any since '36 or '37, have you? A. No, sir.

(Testimony of Adelbert M. Hayes.)

Q. Isn't it a fact that the water has been there ever since? A. That is right.

Q. So you couldn't grow grain there the last ten years or eleven years, could you?

A. That is right. [111]

Q. Is there any water control on that property at the present time, on this particular tract?

A. No, sir.

Q. Now, if I remember aright, you said that cattle have grazed there all winter without hay.

A. They have, yes.

Q. Were they in pretty good condition when they went on the land?

A. Oh, yes, the cattle are always in good condition here in the fall of the year, or should be.

Q. What condition were they in at the end of the winter?

A. They came out of there in good condition.

Q. In as good condition as when they went in?

A. Well, maybe not quite as good, but they all came out of there in good condition.

Q. They lost quite a bit of weight, didn't they?

A. They lost some weight. Cattle always do in the winter.

Q. Even when they are fed hay?

A. Even when they are fed hay, yes, I think cattle will lose a little weight, more or less.

Q. They lose more weight when they have to wander over a large area to get food, wouldn't they?

A. I wouldn't say so if they have plenty of feed, no.

(Testimony of Adelbert M. Hayes.)

Q. No, I say, but when the feed is scarce and they have to wander around? [112]

A. When we left our cattle there the feed wasn't scarce.

Q. But still they did lose weight then?

A. Well, that is natural. That is a condition that you will find any place, I think.

Mr. Fuller: I believe that is all.

Redirect Examination

By Mr. Hicks:

Q. Mr. Hayes, you mentioned something about a dike. Would you tell us, if you know, when that dike was constructed?

A. What is that, please?

Q. You mentioned something about a dike. Would you tell us, if you know, when that dike was constructed?

A. I imagine around '35 or '36.

Mr. Boylan: If the Court please, I don't remember any such testimony and I object to it as improper redirect, not pertaining to any of the issues in this case.

The Court: Objection sustained.

Q. (By Mr. Hicks): Now, Mr. Hayes, I am a little bit confused here, perhaps, but in my direct examination I asked you about this tract carrying so many cattle through the wintertime; then counsel developed something about some fences through there that for a period were down. Will you give us the history of this tract in regard to fences that were maintained on it?

(Testimony of Adelbert M. Hayes.)

A. The Government has never made any effort to maintain their part of the fence down there. [113]

Q. Back before the Government came into this matter, the Bird people, did you maintain fences? Was this tract fenced?

A. Yes, the fences were always kept up in good condition.

Q. And you mentioned, I believe, a three or four-year period when the fences were allowed to deteriorate. A. That is right.

Q. And state whether or not that was during the period when the land was out of your possession.

Mr. Boylan: If the Court please, I object to that as assuming something that has not been shown or proven here. He has testified——

The Court: Objection overruled.

A. Well, during that period and since that time.

Q. (By Mr. Hicks): Mr. Hayes, you have been on that land since you were a little boy?

A. That is right.

Q. I want to ask you if, with the exception that you mention, the land has been kept fenced?

A. It has always been kept fenced except during this period.

Q. And when you talk about running four or five hundred head of cattle on this tract in the years before you leased from the Government, I want to ask you whether those cattle were wintered on this tract? A. They were, on this tract. [114]

Q. And that was year in and year out?

(Testimony of Adelbert M. Hayes.)

A. Year after year.

Q. Now, during the years when you didn't grow grain on these areas that you haven't grown grain on, what if any crops did you get on those particular tracts? Those years when you were not growing grain on this particular tract, what if any crops did you get on that particular tract?

A. Your natural grasses, your meadow grasses,

Q. And of what service are they to you?

A. They are very necessary to winter your stock on. They are very good feed.

Q. Now, counsel asked you about the condition of the cattle when they are wintered there without hay, and I think that is fully covered. Now, I want to ask you how those cattle winter on this tract of land in the manner in which you are operating it now, with the windrows, and that sort of thing?

A. They come through it in good shape. The cattle wintered in fine shape.

Q. Now, how far down on this tract—I am referring down towards the center of the lake—how far down on that tract have you cut the hay, from year to year, and produced the crops that you have mentioned, the hay crops?

A. Natural meadow?

Q. Yes.

A. About like it is there now, about like the way it is cut [115] there now. Perhaps a quarter of a mile further south, at one time or another.

(Testimony of Adelbert M. Hayes.)

Q. And where would it be with reference to the center line as shown on the map?

A. Well, it would be quite a little ways from the center of the lake.

Q. Now, I understand that there is seventy or eighty acres of what counsel referred to as greasewood, is that right? A. That is right.

Q. Now, state whether or not that seventy or eighty acres produces any value to you as a stockman?

A. It does. There is quite a growth of grass on that. It also affords quite a bit of shelter for your cattle, too.

Q. And is the greasewood itself of any utility for cattle?

A. Yes, there is forage from greasewood, for that matter.

Q. And out of the whole eleven hundred acre tract, as I understand, there's some seventy or eighty acres of greasewood? A. That is right.

Mr. Hicks: That is all.

Recross-Examination

By Mr. Fuller:

Q. Is there any greasewood in the lakebed?

A. No greasewood in the lakebed.

Q. Now, this greasewood that we have referred to just now, do [116] you know if greasewood is an indicator of alkali?

A. I think you generally find that there is some alkali where there is greasewood, yes.

(Testimony of Adelbert M. Hayes.)

Q. So that this seventy or eighty acres up there you would consider as alkali soil, wouldn't you?

A. That is right.

Q. There is nothing else growing there? No sagebrush, is there?

A. No sagebrush.

Q. A little salt grass?

A. There's salt grasses, yes. Those grasses grow in alkali.

Q. Now, you say that the Government doesn't maintain those fences. Do you believe the Government should maintain the fences to keep your cattle in?

Mr. Hicks: We object to that as incompetent and irrelevant.

The Court: He may answer.

A. We fixed those fences to keep our cattle in and other cattle out.

Q. (By Mr. Fuller): Your statement was that the Government did not maintain the fences; for that reason your cattle——

A. They did not help to maintain them.

Q. Oh, they did not help to maintain them. How many years were these fences down?

A. Well, of course, when the Government first acquired those properties those fences were all in good shape. They stayed up for a period of years. I think that perhaps those fences [117] washed out of there about '43 or '44.

Q. They washed out practically every year that they had high water, didn't they?

(Testimony of Adelbert M. Hayes.)

A. Not those fences. Those fences were more or less permanent.

Q. What fences washed out when they had the high water?

A. A lot of meander line fences washed out in different places. Not in that particular vicinity they didn't.

Q. They didn't wash out there; but what particular fences on your property washed out during the high water?

A. Well, that fence would be the east line. I don't know if it washed out so much, but it was mashed over and never repaired. That that you were talking about awhile ago, that that was up on the levees that the wind blew over, in those dry years, the water didn't get up on that fence so much.

Mr. Fuller: I think that is all.

Further Redirect Examination

By Mr. Hicks:

Q. Mr. Hayes, did you ever know any of those fences in relation to this tract to wash out before 1935?

A. I think not.

Mr. Hicks: I think that is all.

Further Recross-Examination

By Mr. Fuller:

Q. It was pretty dry in 1929, '30, '31, '32—there wasn't [118] any water there, was there, to wash them out?

A. There was not.

Q. It was dry then, wasn't it?

(Testimony of Adelbert M. Hayes.)

A. That is right.

Mr. Fuller: That is all.

Further Redirect Examination

By Mr. Hicks:

Q. You can remember that land how far back?

A. As far back as I can—I say we have been there since 1907.

Q. From that time up until 1935, did you ever know one of those fences to wash out, up until 1935?

A. No, I can't recall.

Mr. Hicks: That is all.

Further Recross-Examination

By Mr. Fuller:

Q. Were there any fences up until 1935 out in the lakebed? Didn't the cattle just roam all over the old lakebed?

A. Well, of course, up until the lake went dry the lake shore was always our fence line; we didn't have any fences out there.

Q. No fences out there at all? A. No.

Mr. Fuller: That is all.

Mr. Hicks: No further questions. That is all.

(Witness excused.) [119]

The Court: Ladies and gentlemen, you are excused until 1:30.

(The jury was thereupon excused, and in the absence of the jury proceedings were had as follows:)

The Court: I am going to add to my ruling upon the objection a matter that I hadn't mentioned

before, objection to the contract or offer, whatever it may be called, that Mr. Hayes testified that he had been promised not only that he got the five years' occupancy but that he had an option to get the land from year to year in perpetuity, and that matter was not included in the presentation of the offer. Mr. Woodward testified that he redrafted that in accordance with his own ideas to make it conform to his instructions from the Secretary. I take it that that clause does not represent what the Hayeses thought it did when they signed the contract. That is an additional reason for making my ruling as I have in the past, and also it has some effect upon what I think about the Declaration of Taking.

Court is now in recess until 1:30.

(Whereupon, at 12:10 o'clock p.m., Thursday, September 25, 1947, a recess was had until 1:30 p.m., and thereafter, at 1:30 o'clock p.m., the jury was recalled and proceedings were had in the presence of the Court and jury as follows:) [120]

Afternoon Session

1:30 P.M.

Mr. Hicks: I will call Mr. Marcellus B. Hayes, your Honor. Mr. Hayes.

MARCELLUS B. HAYES

one of defendants herein, was thereupon recalled as a witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Your Honor, Mr. Hayes is hard of hearing. May I approach him?

The Court: Yes.

Q. (By Mr. Hicks): Mr. Hayes, you are the Marcellus B. Hayes who is mentioned in the complaint regarding this land? A. Yes, sir.

Q. What is your age, please?

A. I will soon be eighty-four years old.

Q. And what has been your occupation all your lifetime, Mr. Hayes?

A. Well, in my early life I worked at various things, but for the last number of years, half my life, I have been a stock raiser and a farmer.

Q. Running cattle? A. Yes, sir.

Q. And what else? [121]

A. Horse, sheep, hogs,—everything in the live-stock business.

Q. When did you move down to the Malheur Lake district?

(Testimony of Marcellus B. Hayes.)

A. Well, we bought that property in 1910, and I had it leased there two or three years before we bought it.

Q. When did you first move onto this land? That would be 1907?

A. No, we hadn't moved there. We had been there and cut the hay on it, but had an old cabin, but we built a house there along about the time we purchased the land.

Q. Now, Bell Hayes, who is one of the defendants here, is your wife, is that right?

A. Yes, sir.

Q. And did you and Mrs. Hayes move down onto the property?

A. Well, Mrs. Hayes never lived there, but we always had someone there up until, oh, along between '20 and '24 and '25, and then Del lived there for a number of years, made that his home.

Q. Now, since you went on there and first began cutting the hay and began operating the property in 1907, I understand you purchased it in 1910, is that right?

A. Yes, sir.

Q. From that time on up to the present time have you used that land?

A. Every year.

Q. And what did you use it for, Mr. Hayes?

A. For stock purposes, wintering stock, and grazing purposes, hay and grain. [122]

Q. Well, now, you know what we refer to as the deeded land?

A. Yes, sir.

Q. The stuff above the line?

A. Yes, sir.

(Testimony of Marcellus B. Hayes.)

Q. Tell the jury, in your own way, what you have been using that land for?

A. Well, the one hundred and seventy-odd acres there, years ago we cut hay,—there is a greasewood ridge that runs through this land from the house, runs kind of northeast—on both sides of that, and on up until the company, along about—I wouldn't say just how many years, but '34 or '35, they run this fence through there and they cut our meadow in two, but we had six or seven stack yards that we stacked hay in all the time,—not on that particular place, but around the field on the meander there was about three yards that was right on this deeded land that we stacked on.

Q. And the rest of the stack yards were where?

A. Well, on land that we acquired through possession and meander rights and——

Q. You mean the lakebed land?

A. Well, I guess you would call them that.

Q. Below the meander line?

A. It wasn't below the meander line. It was out where the water is.

Q. Are you referring to this land that we are concerned with here? I mean the tract that the Government has taken? [123]

A. Yes, sir.

Q. Now, tell us about the hay production, if there was any, below the meander line on the lake lands back through all these years, the forty years that you have known this land and occupied it.

A. Well, the different years there I believe it was cut up and stacked right around three hundred

(Testimony of Marcellus B. Hayes.)

tons of hay a year, sometimes a little more and sometimes a little less, and one of the largest stack yards we had, stacks, was on the meander out north and east of the house.

Q. What kind of hay production would you get per acre, Mr. Hayes?

Mr. Boylan: If the Court please, I think he should confine the production to recent years. I don't know that he is identifying these years that he is testifying about.

Mr. Hicks: I am assuming the general average, your Honor.

The Court: Well, specify the years.

Q. (By Mr. Hicks): Well, back as you know this land, what is its capacity to produce hay? I mean per ton per acre? I mean how much tonnage per acre?

A. Well, some of it will go a ton and a ton and a half, and lots of that sugar grass will go around two tons. Stacking to an average, I suppose there on that whole place there, the deeded land will average a ton and a half.

Q. And what was the fencing condition on this tract of land [124] through the years up to the present time?

A. Well, we have always kept a fence up there. The land has always been fenced. Even when we was operating the lake there, we had a fence that run on out through the level part out to the center of the lake, and since the water has come back there through the years that fence has washed out on us,

(Testimony of Marcellus B. Hayes.)

but the fence out on the higher land has always been kept up.

Q. Those years that you cut hay on the land did you cut all the hay that you could cut, or just what you needed?

A. Well, very often we cut and bunched and stacked all the hay that we thought we needed and rest of it we left in bunches, just as it is at the present time.

Q. Were there a series of dry years in there, Mr. Hayes? A. Yes, sir.

Q. Could you tell us, just roughly, what years that would be?

A. Well, it started along about '27 and '28, '29, '30 and '31 and '32 and '33 there, and after it got along about '34 and '35 the water commenced coming out in the lake.

Q. Now, during those dry years did that have an effect on your pasture up there?

A. Yes, sir.

Q. Tell the jury about it.

A. Well, when we had the dry years we farmed the lake, sowed oats and rye, and then as the water receded and went out to the center of the lake more, why, the grass came, lots of foxtail. [125] Take it along this time of the year, you go out there, it was just like a thick meadow.

Q. And that was true even during the dry years? A. Yes, sir.

Q. Tell us more about the grain production

(Testimony of Marcellus B. Hayes.)

down there, the kind of crops and what was realized.

A. Well, of course, our crops varied there. We started in not raising too big crops. The first crop we raised was right close to the house, east of the house, south and east, and then it drifted out and as the water dried up we followed it out, put in crops, until it went out to the center of the lake.

Q. What kind of production did you get?

A. Good. A-1.

Q. Could you tell us any more about it?

A. Well, the acreage, what it averaged, we had just as good grain there as is grown in any country. There's lots of oats there that go, oh, sixty or seventy bushels to the acre. Of course, some parts of it wouldn't average that much. As you follow the water out you got your best grain, where the water went off and irrigated it, but, as a whole, lots and lots of years there that grain would grow around seventy bushels to the acre average, oats, or better.

Q. Tell us about the irrigation of this land. How was it accomplished?

A. Well, in the wintertime the water would naturally flow out [126] onto this land, and then we was all ready to farm whenever the water started to recede; we followed it on back, we seeded right up to the water as the water went off this land.

Q. And when would the water reach its highest stage?

A. Well, that depended on different years, of

(Testimony of Marcellus B. Hayes.)

course, and different flows of the water, but along around the middle of June, something like that, would be about the highest.

Q. How many cattle have you been running down there, Mr. Hayes?

A. Well, we generally try to hold our cattle to about five hundred head, my son and I,—sometimes more and sometimes less, but we usually—we have about that number right now. And we winter them,—not all the winter. Last year we put them out and brought them back and took the calves and shoved them all off again. We got home from California the 4th of March, and the 9th of March we brought them back up to the old place and we fed them there nineteen days, and we got lots of rye grass pasture, and that's all the time we fed them last winter.

Q. What condition were those cattle in when you brought them in?

A. Oh, good condition. There was no cattle died from the effects of the winter. They all wintered in good shape.

Q. Now, Mr. Hayes, has that land in its history as you have known it wintered cattle without any hay?

A. There's land adjoining us on the west, people would run cattle there a lifetime that never saw a mouthful of hay in [127] their lives. There ain't a cow that has gone on that ranch that ever fed a mouthful of hay.

Mr. Fuller: If the Court please, I move the tes-

(Testimony of Marcellus B. Hayes.)

timony be stricken as to what was done on another tract of land here.

A. Just a fence between them and us.

The Court: The witness has testified. I will cover it by instructions. I will not grant a mistrial on this. Ladies and gentlemen, the testimony only relates to this land alone. That is all that is to be considered. This matter that has been injected here by Mr. Hayes has nothing to do with this situation,—another tract of land entirely.

Mr. Hicks: Just a fence between them, your Honor. I think he meant this tract, too. I meant to bring that up.

The Court: Well, that applies to you, Mr. Hicks. You are making an argument based upon what he has already said, which I have stricken from the record.

Mr. Hicks: May I ask some further questions in that regard to clarify his answer?

The Court: I should say not. Ladies and gentlemen, there is nothing unfair about this. You are simply trying the conditions as relating to this particular piece of land. When we get in on another piece of land that is an attempt to influence you by something that is not in this case.

Q. (By Mr. Hicks): Now, Mr. Hayes, I want you to limit all of your answers to this tract of land that is involved in this [128] case and no other.

A. All right.

Q. Will you do that? A. All right.

Q. Now, state whether or not, in regard to this

(Testimony of Marcellus B. Hayes.)

tract of land, from your experience with it, it has wintered cattle without hay?

A. We have wintered plenty of cattle there that was wintered right in that pasture, in that field there. There will be a little explanation to that, too. We used to have partitions in the field and there was a drift fence through there. We watched these cattle, and if anything needed feed we put them in the north field and fed them hay, but the stout end of the cattle, they wintered on through there and they wouldn't get anything, but was turned out.

Q. Now, what about the weather conditions and the temperature conditions down there as compared with other areas immediately surrounding?

A. Well, you can go into that Lawen country, where our place is there, and the country is all bare; you come on up around Wright's Point and it is all snow; and you go out into our field there and there's lots of windbrakes, tules, greasewood,—these old cows drift in there of nights, and their little calves, and sleep there of nights, and then they come out in the daytime and go to work on this bunched hay.

Q. Now, just tell the jury generally how the cattle do there in this wintering condition?

A. Well, they winter fine. Of course, we have to feed other places. We look after them. If necessary to move them out of there—maybe in case that snow gets too deep, like hard winters we have in this part of the world, we take them away from there to other places; but the ordinary winter they winter there until such time as we want to pull them out of there.

(Testimony of Marcellus B. Hayes.)

Q. Now, during all these years that you and your son and Mrs. Hayes have been raising cattle, I want to ask you where it was that you wintered your cattle?

A. Well, we wintered them mostly on this lake property since we acquired it and got possession of it, since we got the property.

Q. You mean since 1907?

A. Well, along about that time; but at different times we have had more than five hundred head of cattle, sometimes we have had twice that number, and we have got other lands in the country that when we have got that over-stocked there, why, we move part of them out of there.

Q. Well, now, taking the dry years and the wet years together, Mr. Hayes, let me ask you whether or not there were any years when you did not have plenty of feed for those cattle? A. No, sir.

Q. I mean referring to this tract here? [130]

A. Well, if there wasn't hay on the upland, on the high land, the deeded land, the land we acquired there through possession, we had plenty of feed out in the lake. We sowed rye and oats. Some years we had dozens of big stacks of hay there right out in the lake.

Q. What kind of hay are you talking about now? A. Grain hay.

Q. Can you tell us how grain hay compares with other hay for feeding livestock?

A. Well, it depends on how it is put up and cured. If it is put up right and handled right it is the best hay there is.

(Testimony of Marcellus B. Hayes.)

Q. I want to make sure that you understood my other question. In the forty years you have been down there, I want to ask you if there was ever a year when you did not have plenty of feed for your livestock, either the grain hay or the other forms of hay and forage? A. No, sir.

Mr. Hicks: That is all.

Cross-Examination

By Mr. Fuller:

Q. Mr. Hayes, can you hear me from here?

A. Well, you have got to talk loud.

Q. Maybe I had better move up. If I understood you aright, you say you first moved on that land around 1907 under a lease?

A. We had it leased there for two or three years.

Q. Prior to 1910?

A. I think it was about 1910.

Q. Some time prior to 1910 you had it leased?

A. Yes, sir.

Q. From that time up until the lake began to dry in, I think you said, '28, '29?

A. '28, '29.

Q. Did you ever grow any grain from 1907 or '08 up until 1928 on the lakebed?

A. Well, the lakebed was pretty well under water along different years.

Q. You didn't grow any grain up until —

A. It started drying up there about '28. There was all hay out around them greasewood knowls, along the edge of the meander, and then as soon as

(Testimony of Marcellus B. Hayes.)

the cold weather set in they would drift out onto the higher land there.

Q. My question is, prior to 1927, all the time you lived there, you never grew any grain out on the lakebed, did you?

A. Come up a little closer.

Q. I say, prior to 1927, from the time you first moved on the land, you never grew any grain on the lakebed?

A. No sir.

Q. And then how many years did you grow grain there after 1927 or '28, whatever the year was?

A. Oh, I would say —— [132]

Q. Let me ask you this: When did you first grow grain there?

A. Six or seven years.

Q. Six or seven years ago you grew grain on the lakebed?

A. Something like that. I couldn't give you about the date, about the time.

Q. Then the water started coming back about '34 or '35?

A. What?

Q. The water started coming back in about ——

A. It did, but it never got over all the land there. There was land all over the margin of that lake for half a mile, some places more than that, the water got out there just far enough to create a good growth of grass.

Q. I am talking about the grain that you grew. I understood for about six years you grew grain on the lakebed, is that right?

(Testimony of Marcellus B. Hayes.)

A. Well, something like that. I don't know, it could have been a year short or a year over that.

Q. Six or seven or eight, then? A. Yes.

Q. Since that time you haven't grown any grain on the lakebed, have you?

A. Not this year. We have got grain growing on the higher land.

Q. On the upland? A. Yes sir.

Q. On the deeded land? A. Yes sir. [133]

Q. So it would appear that this is an unusual period of time, this dry period, that has not existed during your lifetime except that one period, is that right? A. I didn't get you.

Q. This time you were growing grain out there, this six or seven or eight years, that is the only time during your lifetime that grain was grown out there on that particular tract of land?

A. On this particular tract of land, of course, I have saw it out there dry in years before. I saw it out there in '88 and '84.

Q. You didn't own property out there at that time? A. No, not at that time.

Q. So from 1907 to 1947 you grew grain six or seven or eight years out there? A. Yes, sir.

Q. Can you grow grain out there this year?

A. Not on the lakebed.

Q. What is the condition of the lakebed this year?

A. Well, it is in fine shape. If it keeps going it will be a wonderful crop there this year. The water is starting to recede. The same conditions is there

(Testimony of Marcellus B. Hayes.)

now as when it grewed good crops. If it keeps on it will be a wonderful year for crops this coming year.

Q. Have you any assurance that next year that won't remain covered with water up to the meander line? [134]

A. No, but I say if conditions remain as they are at the present time another season like this you can farm that lake out there to the center of it.

Q. There has been water there on that land for the last four or five or six years, hasn't there?

A. Oh, yes, longer than that; longer than that.

Q. Mr. Hayes, I will point out on the map here and ask you ——

A. All right. (witness approaches map Government's Exhibit 1.)

Q. Have you ever had any fences down here (indicating)? Has that dike been fenced?

A. Yes sir.

Q. When?

A. Well, '31, '32, '33, during the years. You can kind of see the marks here now. You come plumb to the center of the lake. That is our fence there (indicating).

Q. Oh, you fenced in more than this?

A. We had a fence there, a fence there kind of angled off (indicating). There was no established line through there. It came through there. I don't know whether it would be on the line of this fence that they have got marked there or not, but it wasn't surveyed, but we aimed to get all of our land.

(Testimony of Marcellus B. Hayes.)

Q. Now, how many years was that fenced down there?

A. Well, I couldn't tell you that.

Q. Approximately.

A. It was fenced there until the water got so high it washed the fence out. [135]

Q. During the high water the fence was washed out?

A. The fence was washed out, washed the posts out of the ground.

Q. Is there any fence there now?

A. Yes, sir.

Q. Whereabouts is the fence now?

A. Well, the fence follows out there pretty good. This curves out there, and they claimed this land. It was an old homestead here, comes to the center of the lake, —you can see here—but just where this fence was on the north and south and east side I wouldn't undertake to say.

Q. Isn't it fenced up here (indicating)?

A. There is a fence here, and the Government has a fence right along here (indicating).

Q. That is the meander line fence?

A. That is the meander line fence; but we used to have a fence across here (indicating). We are putting one up there now, two men digging posts there today.

Q. This fence along here, is that the fence that it was testified to that the earth would cover the fence?

A. Yes, sir. We raised, put the fence up on top

(Testimony of Marcellus B. Hayes.)

of this dike here, the same way on this side here. The weeds and stuff drifted up against the fence, then when it got extremeny dry the ground came out here and built up.

Q. During that time the cattle could walk across the fence? [136]

A. Well, if they didn't keep building it up they could.

Q. Did you keep building the fence up?

A. Yes, we have got fences on top of fences now.

Q. About how high are they now?

A. Well, there has been a fence there all the time, you can see that, and it goes up to here, and this here is the Government fence along down here (indicating). They tore our fence down and put up what they considered a better fence.

Q. Now, on the upland—is there any greasewood on the upland? A. Yes sir.

Q. About how much?

A. Oh, I never measured it, but I would say there is sixty or seventy acres there.

Q. And is that where you have the grain growing this year up on the upland?

A. No sir, the grain is right here on this forty that runs out west there.

Q. About how much fence have you got there?

A. Oh, we've got thirty, thirty-five acres. Never measured it. This here is all in oats, this part of that forty there (indicating). There's anyhow, I would say, thirty-five acres of oats, good grain, there, — oh, not too good, but good average crop.

(Testimony of Marcellus B. Hayes.)

Q. This lake is a good deal lower than the surrounding land there, is it not? [137]

A. Well, the elevation, I wouldn't undertake to tell you that. It is lower. That is lower.

Q. The water stays in there a great deal longer than it does in other parts of the land, doesn't it?

A. On the lakebed?

Q. Yes.

A. Yes. Not so awful much longer. The lakebed is more of a uniform bog. When it dries up there the lakebed is level, pretty level.

Q. Does the water evaporate or does it run off?

A. It dries out. When you start to farm, the wind comes from the south and southwest, it flows out there, and then it goes back.

Q. Where does the Blitzen River come in in regard to your place?

A. Well, it is quite a long ways, right across south, on the south side. If I had time here I would show you.

Q. Well, you take the time. A. What?

Q. You take the time to show me where it comes in there.

A. Are you acquainted in that country?

Q. No.

A. You wouldn't know where the Sod House was or the Big Spring, or anything of that sort?

Q. I am asking you, Mr. Hayes.

A. Well, I know, but I want to find out if I would show you [138] whether you would know if I was right.

(Testimony of Marcellus B. Hayes.)

The Court: Don't argue, Mr. Hayes. Just tell him what he wants to know.

A. Well, if I could find the Stringer place or the Marshall place I could show you exactly. Here is—what is this here (indicating)? Houghton?

Q. (By Mr. Fuller): Houghton.

A. Well, the Hill Brothers, Clyde Hill lived about three-quarters of a mile west of the Big Spring, and the Blitzen River runs into the Big Spring and then flows on out into Malheur Lake.

Q. In other words, the Blitzen comes in about opposite from your place, is that right?

A. Pretty much right, yes.

Q. So that would mean that this end of the lake would fill up sooner than the other, wouldn't it?

A. Well, when it comes out here it takes off here towards Mud Lake. It comes out of the Blitzen and flows out on that land there and out towards Mud Lake, and when that is filled it backs up.

Q. Is that also towards your land?

A. No, as I said awhile ago, the bed of Malheur Lake is practically level and when it get out there it spreads in all directions,

Q. Well, spreads towards your place also? [139]

A. Yes, sure, but not too soon. There's the big channel that goes down through Hill's place there and that goes toward the north country.

Q. Carries it off toward your place?

A. Well, some it does. It doesn't carry it all off.

Q. Now, you testified that you wintered your cattle on this particular tract of land, is that right?

(Testimony of Marcellus B. Hayes.)

A. Partly. I wouldn't say that we have kept all of our cattle there every winter. No, I never said that.

Q. Well, how many cattle would you feed there during the winter?

A. Well, sometimes we would winter right around five hundred head of cattle, kept them there the whole blessed winter through.

Q. For how many months would that be?

A. Well, that would be three months of it, when we have plenty of hay, but some years that we were over-stocked—there was years that we had over a thousand head of cattle.

Q. On this land?

A. No, sir, I am talking about Harney Valley.

Q. I am talking about this particular land.

A. No sir, but we wouldn't have them all there.

Q. Have you leased any land on the south side of the lake for the purpose of wintering cattle?

A. One year south of the lake, the old Gibson place. After we got through pasturing here, that is, along in around after January and February, —I wouldn't be exact on the date—we [140] leased the old Gibson place, —that is right close to where Hill's is; you remember where that is there—and bunched that hay and we put them over there and finished them up over there on that bunched hay.

Q. At the present time you are leasing some land up here (indicating), aren't you?

A. A hundred and sixty acres, what they call the old Bill Hayes place. This fence that goes up on this

(Testimony of Marcellus B. Hayes.)

side there, we go from there and tie onto that drift fence, the Government fence.

Q. When you say you winter cattle there, you winter them about three months? That is what the wintering of cattle means, is that right?

A. Well, that is an average feeding of cattle, is three months.

Q. You may take the stand.

A. Of course, in the fall of the year you have your cattle together, you have them in close, more than any three months.

Mr. Fuller: I think that is all.

Redirect Examination

By Mr. Hicks:

Q. Mr. Hayes, —can you hear me from here? I just have a few questions. Can you hear me? Maybe I can walk up a little closer to you.

A. Stop there. That is good enough. [141]

Q. All right. Mr. Hayes, counsel asked you if there was a certain year when the fences washed out on this tract of land, or a certain fence or part of a fence washed out on this tract of land; is that true?

A. In the lakebed?

Q. Yes, lakebed lands.

A. Well, practically all the fence went down, after the water came in, and we quit going down there and using that land.

Q. About what years was that?

A. Oh, '39, '38 or '39, somewhere along there. I wouldn't be definite on that date, but the land that we own there at the present time, the land that the

(Testimony of Marcellus B. Hayes.)

cattle we are going to put there in a few days, we have always kept that fence up.

Q. What I want to ask you was whether there was a single year up until 1935 when there was ever any fence washed out on that tract of land?

Mr. Boylan: If the Court please, I object to that as too far distant in time.

The Court: Overruled.

A. You mean at the north part of the land?

Q. (By Mr. Hicks): Any of the lakebed land?

A. Oh, in '35?

Q. Up to '35 was there ever —

A. No sir. We kept it up. It might have washed out or might have knocked down, but we had someone that rode the fence and [142] looked after it. We never put out cattle down there and turned them loose.

Q. I neglected to ask you about the soil on this lakebed land. Can you tell the jury something about that? A. The soil?

Q. Yes, the quality of soil?

A. You want the color of the soil?

Q. The quality of the soil? A. A-1.

Mr. Hicks: That is all. No further questions.

Mr. Fuller: I think that is all.

Mr. Hicks: Thank you, Mr. Hayes.

(Witness excused.)

Mr. Hicks: We will call Mr. Ausmus. [143]

J. O. AUSMUS

was thereupon produced as a witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

The Clerk: State your full name.

A. J. O. Ausmus.

Direct Examination

By Mr. Hicks:

Q. Mr. Ausmus, what is your occupation?

A. Farmer.

Q. How long have you been a farmer?

A. Twenty years.

Q. What has been your familiarity with the Malheur Lake region, including this tract of land that we are concerned with in this lawsuit?

A. I didn't quite get that.

Q. How long have you been familiar with this tract of land that we are involved with in this proceeding?

A. Oh, I have known it forty years.

Q. State whether or not you used to live down on Malheur Lake yourself?

A. I lived very near there and went to school within a stone's throw of this place.

Q. How long did you live down on the lakebed there?

A. Oh, down on the lakebeds, about thirty-four years, I believe.

Q. Sort of grew up there as a boy, did you? [144]

A. Yes.

Q. Now, Mr. Ausmus, tell us about the condition

(Testimony of J. O. Ausmus.)

of this tract of land—and let me say this to you, Mr. Ausmus: We have got to confine our testimony to this particular tract of land—tell the jury about the grasses, if any, and the hay, if any, and that sort of thing, on this tract as you have known it back that far and, I take it, up to the present itme, if that is correct.

Mr. Boylan: If the Court please, it seems to me that counsel should be confined to a reasonable length of time prior to the filing of the Declaration of Taking. I see no reason for going back forty years.

The Court: Well, I don't think it makes much difference, with this type of question. As a matter of fact, the whole district is being gone into, and, besides, from the beginning by counsel in his opening and I think that you can just segregate this out and try it in a vacuum; therefore, I will permit this testimony, unless the cumulative effect of it, in my opinion, makes it immaterial.

Mr. Hicks: Do you understand the question, Mr. Ausmus?

A. Yes. Well, when I first knew it there was more sugar grass and more finer meadows there than there are or has been in later years. Preceding the dry period there was more grass, finer grasses, than there are at the present time: During those drier years, then, they developed a considerable portion of that, [145] and since the dry years the grasses have come back somewhat and they are courser than they used to be in my recollection.

(Testimony of J. O. Ausmus.)

Q. Well, could you tell us, if you know, from your observation on this tract, what the production has been from year to year in hay, and that sort of thing, forage grasses?

A. Well, there used to be big haystacks there, probably three or four or five tons of haystack, but more recent years they have bunched them instead of stacking them.

Q. Have you yourself farmed down there?

A. Not on this tract.

Q. Not on this tract; but are you familiar with the conditions down there? A. Yes.

Q. Is there any advantage to the stockman in bunching hay, raking and bunching it, rather than stacking it?

A. Yes, there seems to be.

Q. And what is the advantage?

A. Well, there is less cost, and the cow can feed any time she wants, and it seems to improve those grasses to let them lay in bunches, and it rains on it, through chemical change it seems to improve the feeding value of it; they will eat some of that coarse stuff that they wouldn't otherwise. Sometimes it goes into a sort of ensilage.

Q. Now, have you been familiar with the tract the last few years, Mr. Ausmus? [146]

A. The last six or seven years, no, I haven't been much on that in six or seven years. I was down there this summer.

Q. Well, you mentioned something about some grain production on this particular tract.

(Testimony of J. O. Ausmus.)

A. Yes.

Q. Could you tell the jury about that?

A. Yes, I saw some——

Mr. Boylan: If the Court please, I ask that he be confined to a reasonable time and that he designate the time.

The Court: Well, I think that Mr. Hicks should make his questions more definite, but then I don't seem to be able to.

Mr. Hicks: I didn't want to lead, your Honor.

The Court: Well, all right, you could ask him within the last three years and that wouldn't be leading him.

Q. (By Mr. Hicks): Well, Mr. Ausmus, was there any grain production down on this tract as early as 1929, to your knowledge?

Mr. Boylan: Object to that as too far back in time.

The Court: Overruled. Everybody knows that this lake went dry in 1931. It is part of the history. You can't escape it by objecting to the fact that it is twenty years back. Go ahead, answer the question.

A. Yes, I knew grain to grow there about '31.

Q. (By Mr. Hicks): Well, now, from the first time you knew the grain to grow there, whatever the year was, will you go ahead progressively, year by year, as best you can state it, [147] and tell us about grain production on this particular tract.

A. Well, I saw a large acreage there in '31, several hundred acres.

The Court: On this tract?

(Testimony of J. O. Ausmus.)

A. Fine grain.

The Court: On this tract?

A. Yes; it would be, really, through almost to the center of the lake.

The Court: No, I am talking about this tract. That is what you are supposed to be testifying about. Do you mean to say that you saw several hundred acres of grain on this tract?

A. This tract reaches the center of the lake. I understand it goes to the center.

The Court: Yes, I understand it does, too. All right, you go over there and mark on the map there where you saw several hundred acres of grain on this tract.

Q. (By Mr. Hicks): Will you step down, please, Mr. Ausmus. Now, with reference to the 1931 crop that you were mentioning, I wish you would point out on the map the area where the grain was growing that you describe as several hundred acres. Are you familiar with the map?

A. Well, I have seen the map before. Well, there was grain growing from near—not far from the cabin where they feed, there, there was grain growing extending straight south. At that time I didn't know exactly where the lines were, but [148] apparently all this south of the cabin down for quite a ways there. I don't know, it must have been—I rode on the tractor with Del there one time—I don't know, I must have been a mile or mile and a half below the cabin. I made one round with him south of his cabin. Now, of course, the lines weren't

(Testimony of J. O. Ausmus.)

marked out or anything, but I do know that it was south of the cabin there for a mile or more, a mile and a half or such.

Q. A mile and a half of what?

A. Distance. That was '31 or '33.

Q. Well, now, after studying the map, do you think you are sufficiently clear as to where the lines were? By the way, were there fences there at that time?

A. Well, not so much. There had some fencing been done. It may have been 1933, but I know I must have been a mile and a half south of his house. I know I made a big round of it down here (indicating).

Q. All right, now, with reference to the area that you have pointed out, could you state what in your opinion were the number of acres on this particular tract that were in actual grain production at that time?

A. No, I don't believe I could, because, you see, it could have been a little east or a little west on some of that. I couldn't say just where those lines were at that time.

Q. Now, while you are at the map, Mr. Ausmus, I want to ask you whether or not there was grain production on the south [149] part of that during any of those years, the extreme south, down near the center of the lake?

A. Well, I think the greater part of this area—now, there is some over here on the west, possibly tule land, that wasn't in grain; there is a little bit

(Testimony of J. O. Ausmus.)

there in tule that possibly marked the west area of that ground, is my recollection.

Q. Now, what would be the east area?

A. Well, that would be in the grain area, the grain tract.

Q. Now, do you see this line down here, Mr. Ausmus, near the center of the lake, that line (indicating)?

A. Yes.

Q. I want to ask you whether or not there was any grain production in any of those areas down in there?

A. Well, in 1933 I am sure the grain extended across that line, a little beyond.

Q. Well, could you tell us to what extent the area was sown and grew grain, that part down to the south there?

A. The acreage?

Q. Well, just approximate it as best you can, if that is reasonably possible?

A. Well, that seems to be a half mile wide and three miles long. Yes, I would think there was several hundred acres in there.

Q. You may take the stand now. Mr. Ausmus, you have mentioned the years '31 and '33, I believe, when there was grain production on this tract. [150]

A. Yes.

Q. Now, can you tell the jury about any other years, '34, '35, and on through, when there was grain production there?

A. Well, yes, there was grain there two or three years after that, but I couldn't state just the years, but possibly '35 and '36, along in there.

(Testimony of J. O. Ausmus.)

Q. Now, referring to these grain crops that you have seen growing on this land, did you actually see those grain crops? Did you examine them?

A. Yes, I was over there and helped harvest them, and was over there a number of times.

Q. Tell this jury about the kind of crops that you saw growing on this particular tract of land.

A. Well, I saw oats and barley as fine as I ever saw grow.

Q. Have you had some experience in growing grain down there yourself, Mr. Ausmus? I don't mean on this tract, but have you had experience in the Malheur Lake region in growing grain?

A. In that region, yes.

Q. Are you familiar with the soil on this tract?

A. Yes.

Q. And how would you say the soil on this tract compares with the other tracts—well, all right, I will withdraw that. How many years experience have you had growing grain down in that region, Mr. Ausmus? [151]

A. Well, when you say "that region" do you mean below the line or—

Q. Anywhere in that region in and around Malheur Lake?

A. I have some grain land within a mile of the meander line that we have raised a number of crops on, and we have been farming more less for twenty years along in there or near there.

Q. Do you mean farming grain?

A. Yes, I have.

(Testimony of J. O. Ausmus.)

Q. You are familiar, I believe you said, with the quality of the soil? A. Yes.

Q. What do you say about the lakebed land here, Mr. Ausmus, as to being grain land and capable of producing grain?

A. I say it is extremely fertile, some of the best.

Q. Best for what?

A. Best for growing grains.

Q. Now, during this I believe you said forty-year period when you were living down there as a boy and on through, did you have opportunity to observe the Hayeses in their use of this tract of land? A. Observe what?

Q. Did you see the Hayeses and their cattle?

A. Oh, yes, I have ridden down there among their cattle a number of years. [152]

Q. And how far is the place that you live in there from this tract of land?

A. Oh, we own land within two or three miles of it.

Q. Could you tell us whether or not every year during those periods you were upon this land, at one time or another, so you could tell us something about what was growing, and so forth?

A. Yes, I used to be down there when I was running cattle. I used to run cattle down in there. I would be down there every year.

Q. And did you see cattle on the place?

A. Oh, yes.

Q. From your knowledge of this particular tract of land and the Hayeses' occupation of it through

(Testimony of J. O. Ausmus.)

all these years, Mr. Ausmus, I want to ask you whether or not you have ever known of a year that they did not have hay down there aplenty to feed their cattle, or plenty of it to feed their cattle?

A. Oh, yes, they always had a lot of feed on that piece of land.

Q. Would that be true of certain years, or——

A. No, just consistently every year.

Q. Was that true during the dry period?

A. Yes, they had lots of feed down there then too.

Q. And it was true during the wet period?

A. Uh huh. [153]

Mr. Hicks: That is all.

Cross-Examination

By Mr. Boylan:

Q. Do you remember when was the first time that you were ever on this place?

A. Pretty nearly. I was down there when I was about seven or eight years old.

Q. And you have been on the place every year since then? A. No, not every year.

Q. Well, how often?

A. Well, when I ran cattle I went down there every year for, oh, fifteen or twenty years, possibly.

Q. Well, that was in the old times before the dry spell, was it?

A. No, that was up to and including the dry years. I had cattle then.

Q. I see. Well, since the dry years have you been on this place?

(Testimony of J. O. Ausmus.)

A. Well, just once or twice.

Q. Were you there this year? A. Yes.

Q. Were you there last year?

A. No. No, it must have been three or four years ago I went down there after a cow. [154]

Q. How long before that were you there?

A. Well, '38, I guess, was about the last year, 1938.

Q. Since the year 1938, or, in other words, in the last ten years, about that, you have been on this place twice? A. Yes, that is right.

Q. And what was the occasion for you going on the place?

A. I went down after a cow there three or four years ago. Yesterday I went down to look at the place, to look at the forage and grain crop and make an examination of the soil.

Q. You went down yesterday to look it over for the purpose of testifying in this case?

A. Yes.

Q. But you have not been upon the place other than just for that particular purpose and for the purpose of getting the cow three or four years ago during the past ten years?

A. I believe that is right.

Q. So you don't know what has been raised on that place during the last ten years, except as you saw it the time that you went after that cow and as you saw it yesterday, is that right?

A. No, I guess I couldn't say that I had seen it and an eye-witness to it.

(Testimony of J. O. Ausmus.)

Q. You don't know whether Mr. Hayes has raised any grain on this place in the last ten years, do you, except as you may have seen something there yesterday?

A. Well, I pretty nearly know it. [155]

Q. All right, when did he raise grain on this place during the last ten years, other than what you saw out there yesterday?

A. Well, it is my opinion that about '37 was the last crop until this year. I saw that in '37.

Q. So you are satisfied that there was no grain grown on this place from 1937 until this year?

A. No, I don't think there could have been.

Q. Now, I believe you stated that back in 1931 or '33 you went around—what was it? With a combine, or something like that?

A. No, it was in the spring of the year, when he was disking up the bottom there to put a crop in, I made one round with him soon after he started to work on it.

Q. And you started in at the cabin?

A. Yes, just below the cabin.

Q. The cabin is in the vicinity of the meander line, is it?

A. Pretty close to the meander line.

Q. It is on the deeded land, however?

A. Yes, I think so.

Q. And you went how far south?

A. Oh, I think about a mile and a half south and then turned east.

Q. How far east did you go?

(Testimony of J. O. Ausmus.)

A. Well, we must have gone beyond the U. S. line, from the looks of that map there, because we went around quite a large tract of land there. [156]

Q. In other words, you went over onto some adjoining land? A. Well, perhaps we did.

Q. Was there any fence along the east line of this tract at that time?

A. I don't believe there was. No, there wasn't any fence there at that time.

Q. Have you ever seen a fence along the east side of this tract?

A. Well, I don't know that I have. It may have been that there—there was fencing in there all right, but other lands may have been included.

Q. In other words, there were fences——

A. There was some large tracts fenced off there. It was all under fence, you might say, to keep cattle from ranging over it.

Q. But they had no particular reference to this tract of land?

A. I don't know as they did.

Q. Did you run cattle out in that neighborhood?

A. Yes, we had cattle in there at different times.

Q. Did you run any cattle on this land?

A. Yes, some years they would drift in there.

Q. Do you know whether Mr. Hayes had cattle on this land?

A. Oh, yes; yes, he had cattle in there.

Q. His cattle would drift off the land, just the same as yours would drift on it, wouldn't they?

A. Well, down on that lower portion there, the

(Testimony of J. O. Ausmus.)

water would come up in there and the range cattle would drift in there a little while, and later we made some provision, fenced in a little something to keep the outside cattle from coming in there.

Q. Now, when you went this mile and a half south of the cabin, as you have stated, with Del Hayes when he was putting in grain, or whatever he was doing, in the spring there, you didn't go to the center of the lake, did you?

A. No, I don't imagine we did. Really, I don't know.

Q. Did the field go to the center of the lake at that time? A. I don't recall.

Q. Did that field, that grain field, go to the center of the lake?

A. Well, I wouldn't know. I didn't know where the center was at that time. It had never been marked out.

Q. Well, do you know whether Mr. Hayes ever had any grain down there on this place to the center of the lake?

A. No, I wouldn't know whether it reached the center or not.

Q. On the upland or deeded land in there north of the cabin there are a couple of little greasewood knolls there, aren't there? A. Yes.

Q. How much land would you say was in that greasewood patch?

A. Well, I think seventy or eighty acres would catch it all right. [158]

Q. I didn't get it.

(Testimony of J. O. Ausmus.)

A. I think seventy or eighty acres.

Q. Seventy or eighty acres?

A. Yes, that is what I would judge.

Q. And do you know what the growing of greasewood indicates with reference to the soil?

A. Well, it could indicate a percentage of alkali. There is no indication of what the percentage would be from greasewood.

Q. As a matter of fact, you have seen alkali there, haven't you, or evidences of it?

A. I have seen some indications of alkali on those higher knolls, yes.

Mr. Boylan: That is all.

Mr. Hicks: If the Court please, I wanted to make an offer of proof from this witness with regard to the matters that the Court has deemed inadmissible in other cases. Normally, I would ask questions, and so forth, but I do not want to suggest the subject matter that the Court has not gone into. If I could stipulate with counsel I would like to put the matter in at a later time.

The Court: The Court will give you all the opportunity to make an offer of proof relating to the subject matter of which you are speaking, Mr. Hicks, and you need not have the witness on the stand at the time the offer is made.

Mr. Hicks: And I do not have to suggest the questions to [159] him now in order to get the matter in?

The Court: No.

Mr. Boylan: That is all right.

(Testimony of J. O. Ausmus.)

The Court: I must call your attention again to the fact that there is nothing that I have any personal prejudice about having in this record, and the only thing that I have suggested is that there are certain things that are incompetent and if they were put in the record I would grant a mistrial.

Mr. Hicks: Oh, but I don't want to——

The Court: Each time you have made this offer you have stated it was something the Court did not want in the record.

Mr. Hicks: And I beg the Court's pardon.

The Court: I do not care about anything you put in here, subject to what I construe the law to be.

Mr. Hicks: Yes. Thank you, Mr. Ausmus.

(Witness excused.)

Mr. Hicks: Call Mr. Frank Howard.

FRANK HOWARD

was thereupon produced as a witness in behalf of the defendants Hayes, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hicks:

Q. Mr. Howard, what is your occupation?

A. I am a civil engineer.

Q. And where do you reside?

A. In Klamath Falls, Oregon.

Q. Do you have any official capacity with Klamath County?

(Testimony of Frank Howard.)

A. Yes, I am County Surveyor.

Q. And how long have you been engaged in that work?

A. I have been County Surveyor since 1936.

Q. Have you done any farming or stock raising, Mr. Howard?

A. I have farmed at Tule Lake.

Q. Now, tell the jury what your experience has been in the appraisal of lands.

A. For two years, under the direction of the State Tax Commission, I had charge of the appraisal of all the agricultural lands in Klamath County, and since then there have been appraisals of more or less of a casual nature that I am called upon to make.

Q. Do we understand you have done appraisal work up to the present time on a casual basis?

A. Yes. [161]

Q. Do you make certain appraisals every year during that period?

A. Yes, I would say I have, several times a year.

Q. Have you done any appraisals at any time on behalf of the Government, Mr. Howard?

A. I am at the present time acting on an appraisal board for the Reclamation Service.

Q. Have you made any particular study of lake-bed lands? A. Yes, I have.

Q. Is that true of Malheur Lake?

A. Yes, this summer.

Q. Just this summer? A. Yes.

(Testimony of Frank Howard.)

Q. And where do you live with reference to Tule Lake and Klamath Lake?

A. My home is on the border of Upper Klamath Lake. It is in a small drainage district and where we have the largest dike on the Upper Klamath Lake.

Q. Yes. Now, you are a civil engineer, are you, Mr. Howard?

A. Yes.

Q. How long have you been engaged in that?

A. Over thirty-one years.

Q. Now, with reference to your proximity to those lakes down there, have you ever given thought and had experience with regard to engineering problems in respect to lake reclamation?

Mr. Boylan: If the Court please, I object to that unless [162] he confines it to this particular tract of land on Malheur Lake.

The Court: Objection sustained.

Q. (By Mr. Hicks): Mr. Howard, I believe you testified that you had had experience and made some study of lakebed lands as such.

A. Yes.

Q. State whether or not lakebed lands have a quality and character that other farming lands that are not lakebed lands have.

A. Yes, they do.

Q. Would you outline that, please.

A. Well, it is usually a little different type of soil than your uplands. For instance, due to the different type of vegetation that grows in those lakebed lands, you have a different type of soil and the alluvial deposits are put in there in a little different form than they are in other places.

(Testimony of Frank Howard.)

Q. Well, what about alluvial deposits?

A. Well, they are usually very rich soils, a very rich soil.

Q. Did you examine the soil on this particular tract here, Mr. Howard?

A. Yes.

Q. Would you describe it to the jury.

A. It is very similar to our usual Eastern Oregon lakebed lands. Some of it is built up entirely—oh, by vegetation, such as the tule growth, which has made a very heavy peat soil. Other places, where the tules have not grown so long, it is more of an alluvial deposit. However, it is a very rich deposit.

Q. Now, are you referring to this tract of land here?

A. Yes.

Q. To the lakebed land, or to the whole body of it?

A. Well, that had reference to the lakebed part of the land, or to that part of the land below the meander line. Now, that above the meander line is partly alluvial and partly has been blown in by the winds, and partly due to vegetation.

Q. Have you ever had experience—if so, to what extent?—with regard to water control on lakebeds?

A. Yes.

Mr. Boylan: If the Court please,—just a moment—if the Court please, I object to that as being immaterial, unless it is confined to this particular tract of land on Lake Malheur.

Mr. Hicks: May I state my purpose?

The Court: Objection sustained.

Mr. Boylan: I move that the answer be stricken.

(Testimony of Frank Howard.)

Mr. Hicks: May I take an exception, and may I make my offer of proof?

The Court: Yes.

Mr. Hicks: On the same terms as before?

The Court: Yes.

Q. (By Mr. Hicks): Mr. Howard, as an engineer, did you make an investigation and study of this particular tract here with reference to the problems that will be presented in controlling the water on this particular tract? [164] A. Yes.

Mr. Boylan: If the Court please, I object to that as being conjectural.

The Court: Objection sustained.

Mr. Hicks: And may I make an offer of proof on that, your Honor?

The Court: Yes.

Mr. Hicks: On the same terms?

The Court: Yes.

Mr. Hicks: May I have an exception?

The Court: Yes.

Q. (By Mr. Hicks): Mr. Howard, did you, at my request and for the purpose of affording testimony in this case, make a study of this tract with a view to appraisal of it? A. Yes.

Q. Did you classify the land for the purpose of that appraisal? A. I did.

Q. Will you tell us the classifications that you found?

A. I divided that into your uplands and into your lakebed lands for the purposes of simplifying the classification and appraisal. In the deeded lands, or that part of the lands above the meander line, I

(Testimony of Frank Howard.)

classified it into four classes of land. There were the ridges, which had the sage or greasewood, and there there was another type of meadow land, open land, where the soil was not quite so good but which were grown over mostly with salt grass [165] and some foxtail. And then there were the lake bottoms, where the water had receded, which are now being used as grain lands. And then there is the good hay land bordering the meander line. Then below the meander line you have the same good hay land as that which I have described as being above the meander line. And then you have another type of tule land where the elevation is a little higher than the actual lake bottom, and then you have the lake bottom, which I have called those lands, oh, below the elevation of about '91.

Q. And did you make an examination of all those tracts, Mr. Howard? A. Yes.

Q. And study the tracts? A. Yes.

Q. And, from your experience and study that you made of these tracts upon the ground and your knowledge of the entire subject, did you form an opinion as to the fair market value of these lands on the 11th day of February, 1947? A. Yes.

Q. Please state what that opinion is.

A. It was \$40,245.

Mr. Hicks: You may take the witness.

Cross-Examination

By Mr. Fuller:

Q. Mr. Howard, at the present time you are the County Surveyor of Klamath County? [166]

(Testimony of Frank Howard.)

A. Yes.

Q. And prior to that time what was your occupation?

A. Civil Engineer, where it was mostly private engineering work.

Q. Do you hold yourself out as a soil expert?

A. No, I don't put myself up as a soil expert.

Q. The two years that you were appraising for the State Tax Commission, what did that consist of, that appraisal?

A. That appraisal consisted of setting up in Klamath County certain bases from which we could assume the actual value of the land at that time, from which the assessor was able to set his tax base.

Q. Do you mean that you appraised certain properties to arrive at this assessed valuation?

A. Our appraisal was for the full value.

Q. Now, in making these appraisals were you aided by a pattern set by the State Tax Commission as to the values of certain fields, certain lands, and so forth?

A. We were given certain formulae which we fitted to the conditions in Klamath County to arrive at our values.

Q. By that you mean that this pattern would state to you that a certain building of a certain size, a two-story frame building, was considered to be worth so much money?

A. Oh, no, in the matter of buildings we actually had a formula from which we actually figured the cost of construction at that period. [167]

(Testimony of Frank Howard.)

Q. How about the land?

A. The same is true of our land. We had to go into these areas and take all factors into consideration. That is, no two parts of Klamath County would be the same.

Q. In other words, though, this formula that the State Tax Commission gave you, that is what you were guided by in making your appraisals?

A. The formula guided us in arriving at the basis which we used for Klamath County?

Q. Did you have any prior experience than these two years with the State Tax Commission?

A. No.

Q. Then you just went out, you might state, green and started appraising land for the State Tax Commission without any previous experience, is that right?

A. We were given a course of training, of course.

Q. How long was that course?

A. Oh, it lasted a month or so, to begin with, then the State Tax Commission came in occasionally to check us to see if we were going right.

Q. Mr. Howard, will you step down to the map here and point out—well, first, before you come down here, when were you on this land for the purpose of making an appraisal?

A. I beg your pardon, I didn't understand your question. [168]

Q. When were you on this particular tract for the purpose of making an appraisal?

(Testimony of Frank Howard.)

A. I was on it in August and then I was on it again last week.

Q. August of this year? A. Yes.

Q. When were you on there in August?

A. I believe it was—it was on Wednesday, August 27th.

Q. Wednesday, August 27th, of this year?

A. Yes.

Q. How long were you on there at that time?

A. We spent—oh, we spent the whole day, or most of the day, on that tract and an adjoining tract which we had to cross back and forth anyway.

Q. On August 27th you were not only doing this tract but other tracts of land?

A. We had one other tract which we had to cross back and forth in order to get in to this one.

Q. You did not spend all your time, then, on this tract, did you? A. No.

Q. Now, what other time were you on the land?

A. On last Saturday.

Q. Last Saturday. How long were you there last Saturday?

A. I was there in the afternoon.

Q. How long? [169]

A. Oh, we left here—we were on there several hours. I don't know just what time it was. It was late in the afternoon.

Q. Now, will you approach the map here. This is the meander line, is it not (indicating)?

A. Yes sir.

Q. Describe what you found above the meander line?

(Testimony of Frank Howard.)

A. I found land which was the high ridges covered with greasewood and salt grass, and then open meadows——

Q. How much, now, of greasewood and salt grass? Where did you find that? Point it out to me.

A. It was approximately this area right in here (indicating).

Q. About how many acres of that would be greasewood?

A. I estimated it at 70 acres.

Q. Seventy acres of greasewood. Now, what value did you place upon that?

A. Ten dollars an acre.

Q. Of that greasewood? A. Yes.

Q. What does greasewood indicate, so far as the soil is concerned?

A. Oh, it indicates that there would be alkali and there would be indications of soluble alkali on top of the soil.

Q. And that is about how many acres?

A. About seventy.

Q. And that would be seven thousand dollars—— [170]

A. No, seven hundred dollars.

Q. ——seven hundred dollars for that alkali?

A. Yes.

Q. Then what else did you find up there?

A. Then I found the open meadow, which was mostly——

Q. Where was that?

A. That is this forty in here (indicating).

(Testimony of Frank Howard.)

Q. How many acres of that?

A. Well, that together with other open meadow along the edge of this greasewood land and along the south part of this, 43 acres.

Q. And how much value did you place on that?

A. Fifteen dollars an acre.

Q. Fifteen dollars on the meadow land?

A. Yes.

Q. What is the total of that?

A. That would be \$645.

Q. All right, what else did you find in there?

A. We found grain land,—that is, lake bottom, in which oats were sown.

Q. A lake bottom?

A. It is an old lake bottom. It is lake bottom of higher elevation than this other.

Q. What lake is that?

A. Well, it isn't a lake. It is an area shown by this high [171] flat area in here (indicating), confined by higher ridges.

Q. A low depression on the upland?

A. It is.

Q. How many acres of that?

A. I estimated 30 acres of grain land.

Q. At how much an acre?

A. A hundred dollars an acre.

Q. That is for the grain land on which grain is growing this year? A. Yes.

Q. Did you know of grain having been grown there in previous years? A. No.

Q. Did you know that it was growing there last year? A. No.

(Testimony of Frank Howard.)

Q. By virtue of the fact that it is grain land you put a hundred dollars an acre on that?

A. Any land that will grow that kind of a crop is worth a hundred dollars an acre.

Q. If it only grows it once in a lifetime?

A. No, not necessarily that, but it indicates that it will grow it again.

Q. Have you ever heard of them growing grain there before?

A. I have heard, as I understand it, that it had grown.

Q. On the upland? [172]

A. In this area here (indicating).

Q. Who testified to that?

A. Well, nobody testified to that here, but I got that from—I don't know as I can identify them, but that is my understanding, that there had been grain growing there.

Q. Have you got anything else in the upland?

A. Yes.

Q. Pardon me, that was \$3,000, that last?

A. Yes.

Q. What else do you have in the upland?

A. I have got 30 acres of good hay land right along this edge near the meander line.

Q. What value did you place upon that?

A. Fifty dollars an acre.

Q. And the total. A. It is \$1500.

Q. Now, is there anything else in the upland?

A. Yes, there is some fencing to be taken into consideration.

(Testimony of Frank Howard.)

Q. Where is that fencing on the upland?

A. Well, in estimating the fence on this upland I took the total of the exterior band and, as a usual thing, the owner of the land can only claim half of the fence, so I gave him half of the exterior fencing, and then this meander fence.

Q. What value did you put on that?

A. Fourteen hundred dollars. [173]

Q. That is the half value?

A. Well, that includes the half value, and the value of this fence (indicating).

Q. What buildings did you find on the land?

A. I didn't find any.

Q. And the lakebed, how did you classify that?

A. Well, there is good hay land and then there are certain——

Q. Where is the good hay land?

A. Well, it lies from this meander line down to about in here (indicating).

Q. How many acres of that?

A. There's 200 acres in there.

Q. Is that all hay land?

A. That has been cut there this year.

Q. Does that extend over into here? Is that hay land in there (indicating)?

A. No, that is not there. That is the part that I started to say that I excluded from the good hay land. That is another lake bottom.

Q. Your hay land just goes around there (indicating), is that right? A. Yes.

Q. Two hundred acres. What is the value?

(Testimony of Frank Howard.)

A. Fifty dollars an acre.

Q. What is the total? [174]

A. Ten thousand dollars.

Q. Now, this other area in here that you call another lake bottom (indicating)?

A. Well, that isn't in hay land. At the present time it is heavy to tules and it is a very heavy peat soil, and I gave it the same price that I did the other.

Q. What was that?

A. Fifty dollars an acre.

Q. How many acres in that?

A. About 168 acres. That also includes some land down here (indicating).

Q. What is the total, then?

A. Eight thousand four hundred dollars.

Q. I understand, now, that is for the tule land that you just mentioned? A. Yes.

Q. Now, below that what did you find?

A. That is what I classified strictly as a lake bottom, from about this meander line of—or, not meander line—or this contour line of an elevation of '91 on out. That is mud and scattered tules at the present time.

Q. Anything growing there outside of tules?

A. Beg your pardon?

Q. Anything growing there outside of tules?

A. Oh, along the edges, where the water has **dried up**, it is [175] showing indications of certain weeds that are turning green.

Q. Very damp down there at the present time?

(Testimony of Frank Howard.)

A. Yes.

Q. Did you get down on it?

A. No, I couldn't get out on it.

Q. How many acres in that?

A. I estimated 560 acres.

Q. And what value per acre did you place on that?

A. Twelve and a half an acre.

Q. And the total?

A. Thirteen thousand seven hundred fifty dollars. (sic)

Q. In other words, thirteen thousand dollars for this land that is practically mud at the present time?

A. Well, there's lots of tules in there.

Q. You can't get to them at the present time?

A. Well, stock can later.

Q. Any fences down there?

A. Yes, this fence seems to be in (indicating).

Q. Seems to be?

A. Yes, as far as we could see, that fence is in.

Q. How far down did you go?

A. Well, just as far as we could get here on this part (indicating).

That is the fence in the center you are talking about?

A. Yes. [176]

Q. Now, I am talking about the fence on the outside here (indicating).

A. There is a fence there at least part way, but I have forgotten just how that runs and I didn't make a note of it.

Q. Where is that part way?

(Testimony of Frank Howard.)

A. I notice the flags, that, is the red flags, indicating this line down here (indicating).

Q. Did you examine those fences?

A. I examined this one, but I believe that I thought I was over this line (indicating).

Q. You don't know whether you were here or here (indicating)?

A. Yes, I was. This is a stack yard, an old stack yard, here. We were here (indicating).

Q. You may take the stand. Did you put any value on that fence below the meander line?

A. I put \$900 on the fence below the meander line.

Q. Those figures that you just gave to me now, what do they total?

A. Forty thousand two hundred forty-five dollars.

Q. That is the figure that you placed on the various tracts of land here (indicating)?

A. Yes, that is the total.

Q. I believe you said that on the upland you saw some sage growing, is that right?

A. I believe it was along that upper forty, I saw just a few [177] patches of those little—I think they call it rabbit sage.

Q. It wasn't very noticeable, was it?

A. No, it isn't?

Q. Practically all that area up there was grease-wood, isn't that right? A. That is right.

Mr. Fuller: That is all.

(Testimony of Frank Howard.)

Redirect Examination

By Mr. Hicks:

Q. Mr. Howard, that fencing on which you put the valuation of \$900, is that in respect to all the lakebed lands below the meander line, clear down?

A. I don't understand which——

Q. Counsel asked you about a \$900 valuation on some fencing.

A. Oh, that was for the fencing below the meander line, yes.

Q. Does that mean the lateral lines of the tract?

A. Yes.

Q. Clear down to the center of the lake?

A. Well, the fence on the east side seems to have been obliterated, as near as I could see.

Q. Well, how much fence was included within that figure?

A. How much fence?

Q. How much fence, yes?

A. There were something over 900 rods. [178]

Q. Nine hundred rods of fence?

A. Yes.

Q. Which you apparently valued at a dollar a rod, is that right?

A. Yes.

Q. Sixteen feet in a rod?

A. Yes, sixteen and a half.

Q. That included the wiring, the posts, and everything?

A. Yes.

Mr. Hicks: That is all.

(Testimony of Frank Howard.)

Recross-Examination

By Mr. Fuller:

Q. Just a minute. Now, where is that 900 rods of fencing? Will you point that out?

A. The only fence that I considered in here was this stretch that comes from this corner out to here and down through like this (indicating).

Q. How far does that come down?

A. I could see these posts away out here, and we were told that it went away out to this corner (indicating).

Q. Well, did you see the condition of the fence?

A. We could see that there was a fence, yes.

Q. Now, how far down that fence were you?

A. We were clear down here as far as we could get (indicating).

Q. How far was that?

A. That was down to about the '91 meander.

Q. Down about there (indicating)?

A. Yes.

Q. Then from there you could see that?

A. We couldn't see all the fence, no.

Q. How far is that down there?

A. You want to know how far it is?

Q. Yes.

A. That is about 520 rods from right there (indicating).

Q. How far is that in feet?

A. Times sixteen and a half,—that is about 8,500 feet.

Q. About a mile and a half?

(Testimony of Frank Howard.)

A. It is, yes, a little over a mile and a half.

Q. And you could see down there a mile and a half?

A. From up on here, from up on this knoll, yes sir, quite high here, an old stack yard, and then standing on top we could see down here for at least a mile (indicating).

Q. There's tules growing down there, aren't there? A. Yes, there's tules down there.

Q. Higher than the fence?

A. Yes, somewhat, but, nevertheless, you could see the indications of fence.

Q. Could you see the wire, or did you just see the fence posts?

A. We could see the fence posts.

Q. You don't know whether there was wire on it or not, do you? [180]

A. No.

Q. Then how could you place a dollar a rod on it, when you don't know whether there was wire on it?

A. Well, one thing I had to go on here was a map which was made by the Bureau, which indicates a fence, and in most cases we have found it correct.

Q. Did it say there was wire on the fences?

A. It indicates a fence.

Q. It indicates a fence when the map was made?

A. Yes.

Q. It doesn't tell you what condition it was in, does it? A. No.

(Testimony of Frank Howard.)

Q. And without seeing it you put a value of a dollar a rod on that? A. Yes.

Mr. Fuller: That is all.

Mr. Hicks: No further questions.

(Witness excused.)

The Court: A short recess, ladies and gentlemen.

(The jury was thereupon excused.)

The Court: Court is in recess.

(Short recess.)

Mr. Hicks: Call Mr. R. D. Cozad, your Honor.

R. D. COZAD

was thereupon produced as a witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

The Clerk: State your name.

A. R. D. Cozad.

Direct Examination

By Mr. Hicks:

Q. Where do you reside, Mr. Cozad?

A. Canyon City, Grant County.

Q. That is in Eastern Oregon? A. Yes.

Q. How long have you lived in Eastern Oregon?

A. All my life.

Q. Did you ever live in Harney County?

A. Yes, I have.

Q. Over what period of years?

(Testimony of R. D. Cozad.)

A. Well, I lived here for seventeen years, from '17 to '34.

Q. Did you have any experience in farming, in the growing of cattle and livestock?

A. Yes, I did.

Q. What kind of work were you engaged in here during that 17-year period?

A. Well, farming and stock raising and feeding beef cattle.

Q. You had a ranch here, did you? [182]

A. Yes, I did.

Q. Where was that ranch with reference to Malheur Lake?

A. Well, about twelve or fourteen miles north.

Q. State whether or not throughout your whole life you have been rather closely associated with the growing of livestock?

A. Yes, I have.

Q. And your occupation at this time is what?

A. I am with the State Highway Department, right-of-way Agent, purchasing lands and making property settlements and appraisals.

Q. Appraisals, did you say? A. Yes.

Q. State what your main duties are in connection with your work in behalf of the State Highway Commission?

A. Well, buying lands for road purposes, state highway purposes, and for park sites and material sites and quarries, and so forth.

Q. Well, to what extent does that lead you into appraisal work?

A. Well, in ascertaining the price of property,

(Testimony of R. D. Cozad.)

in nearly every unit we appraise the overall cost of the unit, or the price of the whole land, to determine what the parcel we take should be worth.

Q. And you first appraise the whole property of which you take a part?

A. The immediate part, yes. [183]

Q. And then ascertain the price of the tract you take? A. Yes, sir.

Q. And you have been doing that for how long?

A. Nearly seven years.

Q. Continuously? A. Yes.

Q. Aside from your experience as an appraiser, have you appraised otherwise?

A. Yes, I have. I appraised land for the Federal Land Bank for a good many years in Harney County, and after the World War I, under the soldiers' bonus act I appraised land a few years here.

Q. Now, in making those appraisals did you have occasion to appraise stock lands?

A. Pardon me?

Q. In making those appraisals did you appraise grazing lands and stock-raising lands?

A. That is right.

Q. Farming lands? A. That is right.

Q. All types of farming lands?

A. That is right?

Q. Did you, at my request, examine the tract that we are involved with here in this lawsuit?

A. Yes, I did.

Q. And did you go down there at my request

(Testimony of R. D. Cozad.)

and examine it and [184] investigate it and study it? A. Yes, I did.

Q. With a view to appraising it? A. I did.

Q. And do you have an opinion, from the investigation that you made there, as to the value of this tract of land, Mr. Cozad? A. Yes, I do.

Q. Now, in arriving at that opinion, will you tell me how you approach the problem and how you arrive at it?

A. Well, I sort of classified that land, the surveyed lands and the lower lake lands, into three or four different classifications in each tract. I found greasewood and salt grass knolls, and a small area in sagebrush that is not in that particular piece, and part of it in meadow or wild hay, a good deal, and some of it in oats.

Q. Now, in making your evaluation of this tract how did you consider it? By that I mean as a stock-raising matter or an overall purpose, or what?

A. Yes, I tried to make it a conservative estimate as to what I saw of it down there as a stock-raising deal.

Q. And in your opinion what is the value of that tract as of February 22, 1947, the fair, reasonable market value of the tract,—wait a minute; that is February 11th, pardon me, 1947?

A. Twenty-three thousand eight hundred eighty-five dollars forty cents. [185]

Q. Twenty-three thousand eight hundred eighty-five dollars forty cents?

A. Twenty-three thousand eight hundred eighty-five dollars forty cents.

(Testimony of R. D. Cozad.)

Q. For the whole tract? A. That is right.

Mr. Hicks: You may take the witness.

Cross-Examination

By Mr. Boylan:

Q. That is the full, fair market value of the land as of February 11, 1947? A. As I see it.

Q. Without any restrictions upon it whatever?

A. No.

Q. Now, Mr. Cozad, do you know what the annual rental value or use value of this land is?

A. No, I do not.

Q. In this case, Mr. Cozad, the Government is taking the land by a Declaration of Taking which was filed on February 11th of this year, I believe, subject, however, to a five-year use or tenancy in livestock ranching operations, such as harvesting operations and feeding of hay to stock for that portion of this land, being the surveyed land and Special Master Tract No. 48, in the bed of Malheur Lake, for the period of five years from [186] October 9, 1946, in accordance with the rules and regulations of the Secretary of the Interior. Did you make an appraisal of this land—

Mr. Hicks: Your Honor, I want to object to this. This is not proper cross-examination. We did not go into that on direct examination. He can make him his witness, if he wants to.

The Court: Well, your duty, as I understand it, is to prove the value of the land which is to be taken. As I understand, everybody is agreed here that the land taken is the land subject to the reser-

(Testimony of R. D. Cozad.)

vation. While the objection was not made at the time you asked the question and therefore I paid no attention to it, I think you have no right to object to this line of cross-examination.

Mr. Hicks: Very well.

Q. (By Mr. Boylan): Well, did you make your appraisal of this land subject to that reservation, Mr. Cozad? A. No, I did not.

Q. Do you have any means of ascertaining at this time what the fair market value of this land would be subject to that five-year reservation?

A. Well, I might make a guess at it. The first time—I had this appraisal made a few days ago, and the first time I knew anything about this reservation or any deal that was made there I heard in the courtroom here awhile ago. I don't know——

Q. Well, were you informed as to what it was that you were [187] appraising at the time that you were sent down there to appraise it?

A. I was asked to make an appraisal on the land as I saw it out there.

Q. Do you know what that Special Master Tract No. 48 is, how much of the land that consists of?

A. Is that this tract?

Q. Well, that portion of this tract which is known as Special Master Tract No. 48,—do you know what that consists of?

A. I had this particular tract. I don't know what the number of the tract is, but I know what is in this tract of land that I have appraised.

Q. Well, for your information, I will state that the Special Master Tract No. 48 does not include

(Testimony of R. D. Cozad.)

this entire tract of land that is being taken; but do you know what Special Master Tract No. 48 is?

A. No; I made my appraisal on the surveyed lands and the lakebed lands that are shown on this map here, 1101 acres.

Q. In other words, the appraisal that you have put upon this land that you have testified to does not include or cover the estate that is taken in this land by the Government, is that right?

A. Not at all.

Q. Well, Mr. Cozad, would the value, just as a general matter, without putting any figures on it, would the value of this land [188] with that reservation on a portion of it be the same as the value that you have put upon it?

A. Well, it probably would not.

Q. Would it be greater or less?

A. Well, it would be some less.

Q. Are you able at this time to say how much less?

A. I would rather not until I study it a little bit.

Mr. Boylan: If the Court please, in this case the witness has testified to something else than the property that is being taken and he has stated that he is not in a position to testify to the value of the property that is taken as of the date of the taking. I therefore move the Court to strike his testimony and instruct the jury not to consider it, it not being the property under condemnation.

The Court: Well, wouldn't that apply to all the testimony that has been taken so far?

(Testimony of R. D. Cozad.)

Mr. Boylan: I think probably it would, your Honor.

The Court: I think so, too, and, under the circumstances, there being no objection at the time that the questions were asked, the Court overrules the motion to strike. However, I caution the jury that this testimony is not to be taken without some very considerable consideration upon your part as to the reservation that is in here in the Declaration of Taking, a very important reservation.

Mr. Boylan: Might we have an exception, your Honor? [189]

The Court: Yes.

Q. (By Mr. Boylan): You were on that property recently, I assume? A. Yes.

Q. I believe you testified that you lived in this county until 1934? A. Yes, I did.

Q. Were you familiar with this land at that time?

A. Yes, I have been familiar with that land, more or less, for many, many years.

Q. With this particular tract of land?

A. That is right.

Mr. Boylan: Is there any—well, that is all, Mr. Cozad.

Mr. Hicks: Thank you, that is all.

(Witness excused.)

Mr. Hicks: Call Bell Hayes for just a few questions, your Honor. Mrs. Hayes, will you take the stand. [190]

MARY I. HAYES

one of defendants herein, was thereupon produced as witness in behalf of the defendants Hayes and, having first been duly sworn, was examined and testified as follows:

Direct Examination

Mr. Hicks: Will you please mark those.

(Three photographs, so produced, were thereupon marked for identification as Defendants' Exhibits 7, 8 and 9.)

By Mr. Hicks:

Q. Mrs. Hayes, you are the wife of Marcellus B. Hayes? A. I am.

Q. And you are one of the defendants in this case? A. Yes.

Q. And what is your age, please?

A. Seventy-three past.

Q. Now, are you familiar with the land that is involved in this proceeding that the Government has taken? A. Well, yes.

Q. Did you hand me some pictures of grain crops—of a grain crop that was grown down on this very land? A. I did.

Q. I hand you Exhibits numbered 7, 8 and 9 and ask you to examine those pictures.

Mr. Boylan: If the Court please, before there is any [191] testimony given as to those pictures I think that counsel should inquire into the time and place, and anything further, before there is any statement made with reference to them.

Mr. Hicks: I am going to do that. I simply

(Testimony of Mary I. Hayes.)

asked her if those were the pictures she handed me, I believe. That is all I intended to ask her.

The Court: Well, you should tell us what years they were taken.

Q. (By Mr. Hicks): Yes, could you tell us in what years those pictures were taken?

A. In 1931.

Q. And did you see the land, the area shown in those pictures, in 1931? A. Yes.

Q. And do those pictures correctly show the land as it was out there at that time?

A. It does.

Mr. Boylan: If the Court please, the testimony does not identify the place, whether these pictures were taken on this land or not.

Q. (By Mr. Hicks): Well, Mrs. Hayes, do you know for sure that these pictures do show this very tract of land that the jury is concerned about here?

A. Well, they certainly do. They were taken at that time down there and finished. [192]

Q. You are familiar with that land, are you?

A. Yes.

Q. And how many years have you been familiar with it, Mrs. Hayes? A. With that land?

Q. Yes.

A. Well, we bought the land in 1910, and we had it rented three years before. I have been familiar with it ever since.

Q. And have you owned and operated it ever since? A. Yes, sir.

(Testimony of Mary I. Hayes.)

Q. Do you know the area where this land is located that is shown on the pictures?

A. Well, about, yes. I know one of them in particular and I was down on it when they was combining,—of course, I couldn't designate it by number, or anything like that, but I was down there when they were combining, saw that combine running down there.

Q. Well, you see, our concern is that you know what is shown by these pictures, to be sure that it was on this land that is involved here.

A. Yes, sir.

Q. And that the pictures correctly reflect and represent what appeared there at that time.

A. Yes, sir.

Q. Is that all true? [193]

A. That is true.

Mr. Hicks: Would the Court like to examine the pictures? I would like to offer them.

Mr. Boylan: If the Court please, I object to the introduction of these pictures, for the reason, first, that they are too far away from the present time, or the time of the taking, in point of time to be of any value in estimating the value of this land at the time of the taking, which was early this year. 1931 was some sixteen years ago, and, as the evidence has shown, it was under an extraordinary climatic condition which is entirely different from the climatic condition that has been prevalent for the past ten years. We feel that those pictures are not proper to go to a jury.

(Testimony of Mary I. Hayes.)

Mr. Hicks: Very well, your Honor.

The Court: Well, there are two pictures that I am going to exclude because they have absolutely nothing to do with it at all.

Mr. Hicks: I will withdraw that.

The Court: Now, as to Exhibit 9, Mrs. Hayes, did you take this picture? A. No, sir.

Q. Who took it?

A. I think George Pierce took it, but I wouldn't be positive.

Q. Were you there at the time?

A. No, sir. [194]

Mr. Hicks: We withdraw the offer, your Honor. That is all.

The Court: Objection sustained.

Mr. Hicks: That is all, thank you, Mrs. Hayes.

Mr. Boylan: No cross-examination.

Mr. Hicks: That is all.

(Witness excused.)

Mr. Hicks: We rest, your Honor. We rest.

(Defendants Hayes Rest) [195]

Mr. Fuller: Call Mr. Toucey.

BERT J. G. TOUCEY

was thereupon produced as a witness in behalf of the plaintiff herein and, having first been duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. Bert J. G. Toucey.

Direct Examination

By Mr. Fuller:

Q. Mr. Toucey, by whom are you employed?

A. By the U. S. Fish and Wildlife Service.

Q. And how long have you been so employed by them?

A. Since 1931, except for five years in the service.

Q. What were the five years that you were in the service? A. From 1941 to 1946.

Q. Then you were employed from 1931 to '41 and from '46 up to the present time, is that right?

A. That is correct.

Q. Now, Mr. Toucey, are you familiar with the particular tract of land that is the subject of this condemnation suit? A. I am.

Q. When did you first become acquainted with this particular parcel of land?

A. In the summer of 1931; that is, part of it.

Q. Were you down here on the lakebed that summer? A. I was.

Q. What were you doing here at that time?

A. I was engaged in the topographic survey of the Malheur Lake, Mud Lake and Harney Lake areas and was actually doing instrument work on a

(Testimony of Bert J. G. Toucey.)

plane table that made the map that was compiled at that time.

Q. Is this the map that was compiled at that time?

A. That is the map of Malheur Lake that was compiled at that time.

Q. In the year 1931? A. That is correct.

Q. And did you do any particular work on this particular tract of land?

A. I worked on the south end of this tract of land.

Q. Now, have you known this tract of land since that time?

A. I was on that tract of land again in 1937 and also in the fall of 1938.

Q. Now, will you describe this particular tract of land, to the best of your knowledge, as it appeared in 1931?

A. Well, in 1931 the area that I worked on in particular was to the south of that area, and as we worked up——

Q. Would you mind pointing that out on the map?

A. The area that I worked on in particular was this area down in here (indicating). As we worked east from the west there and got into this country that is shown as being flat due to [197] the lack of density of contours it became—I mean we approached an area that was barren of vegetation; it was drying up, the entire area was dry except for a very small area right around the mouth of Blitzen

(Testimony of Bert J. G. Toucey.)

River. That area had a white dust on top of it at that time, up until you got to this area where the grain fields were.

Q. Do you recall ever having seen grain grown on this particular tract in 1931?

A. I would like to state it this way, that I mapped the area that is bounded by this line as shown on this map and subsequent to that the boundaries of this ownership have been plotted on there.

Q. Well, where in reference to that line which you plotted on this map was the grain grown?

A. To the east of that line.

Q. To the east of that line, and not on this particular tract?

A. Except for this small area right in there (indicating).

Q. Right in there. Now, in 1934 I believe you said you were again familiar with this tract?

A. 1937.

Q. 1937. Will you describe the conditions as you found it at that time?

A. Well, at that time we were doing some surveying on this high ground across here. In other words, at that time we did some work at the north end of the area, and particularly on this [198] high ground that we rode across yesterday.

Q. What was the condition of that ground at that time?

A. At that time that high ground had—was mostly covered with rush and thistles, with a sparse growth of grass, and the rest of the area, as I re-

(Testimony of Bert J. G. Toucey.)

call,—I am a little hazy on this, but, as I recall, it was more a slight growth or some growth of fox-tail, but definitely it was not the grass type of vegetation that is on there now, and there were large open areas, in this northern end, of that black dust that had been blown around there for years. This fence line was very prominent as being blow dirt to the—well, almost as high as the fence, I will say.

Q. Was that in 1937?

A. Yes, sir, that is right.

Q. Which fence was that that was covered with dirt?

A. That was this fence that we went south along yesterday.

Q. Now, when were you again on this tract of land?

A. I was there in the fall of 1938, at the time we had the court there.

Q. And what was the condition of the fence at that time?

A. At that time we were unable to get south of this fence. We started to go across there, but that was a barren mud flat.

Q. Were you able to get any further south than the meander line?

A. At the time that we took the court down there I remember [199] distinctly that we were not able to get any further south. Now, whether we were in my preliminary work I would not be able to say for sure.

(Testimony of Bert J. G. Toucey.)

Q. And since 1938 have you been on there until yesterday?

A. Not until just yesterday, no, sir.

Q. In 1931 do you recall any crops of any kind grown on this particular tract of land, now,—do you recall any crops growing there?

A. Well, the grain was growing in that general area, and, as I say, we mapped that very accurately at that time and since that time that boundary line has been projected on there, so there was undoubtedly that small area of grain within this tract of land.

Q. What was the condition, was it dry or wet, down there in the south part of this tract then?

A. It was dry.

Q. Would you say it was dusty?

A. That is right. The wind—we had some dust storms down there where it was impossible to do survey work.

Q. What year was that?

A. That was in 1931.

Q. Do you recall any fences down there on the east and west boundary of this tract in 1931?

A. On the boundary as now computed there were no fences.

Q. Were there any fences enclosing this area in 1931? [200]

A. Not this particular area.

Mr. Fuller: I believe that is all.

Cross-Examination

By Mr. Hicks:

Q. Well, Mr. Toucey, when you were down there

(Testimony of Bert J. G. Toucey.)

in 1931 you saw fences all over the place, didn't you? A. Sure, there were fences there.

Q. Yes. Now, the lines of this particular tract had not been definitely identified, is that true, to your knowledge? A. That is right.

Q. But the lands were enclosed with good fences throughout, weren't they? A. What lands?

Q. Well, these various lands on the lakebed, including these lands and these others that you have mentioned? A. Yes.

Q. What you mean to say is that there was not a fence along each line here, and so forth, as the tract appears on the map? A. Yes.

Q. That is what you meant, wasn't it?

A. Yes, sir.

Q. But the lands that the Hayeses were using there, and the other folks, were fenced with good fences? A. That is right.

Q. Now, you spoke about dust in 1931. You likewise found dust [201] there in '34, didn't you, Mr. Toucey? A. Surely.

Q. And that was in those dry years, and the lake in the summertime went completely dry, isn't that correct? A. Yes.

Q. And you certainly went on there in 1931, isn't that true? A. Yes.

Q. What did you go on there for, Mr. Toucey?

A. For the purpose of making that topographic map?

Q. And what was the purpose of making this topographic map?

(Testimony of Bert J. G. Toucey.)

Mr. Boylan: If the Court please, I object to that as being improper cross-examination.

Mr. Hicks: I think it is important, your Honor.

The Court: No, the purpose has no value.

Q. (By Mr. Hicks): Mr. Toucey, when you went down there in 1931 you helped prepare this map, didn't you? A. That is correct.

Q. I notice on the map houses and improvements located out there in what is now known as the middle of the lake, in various places; isn't that correct? A. Yes.

Q. And were people living in those places at that time?

Mr. Boylan: If the Court please, I object to that as improper cross-examination.

The Court: Objection sustained. [202]

Q. (By Mr. Hicks): Mr. Toucey, you mentioned some grain fields in your direct examination and you pointed to a general area on the map. I wonder if you would step down to the map and definitely indicate the areas that you found in grain.

A. The grain fields are identified or bounded by this broken line. That is the westerly boundary of this large grain area (indicating).

Q. And on the map you have identified that by noting grain fields written on the map, is that correct? A. On the original map, that is right.

Q. And those embrace the tract that we are concerned with here, don't they, Mr. Toucey?

A. A very small part of that tract is included in that line.

(Testimony of Bert J. G. Toucey.)

Q. And that only purports to show the grain fields that were there in 1931?

A. That is correct.

Q. Now, did you make any investigation of grain fields as they appeared in 1934?

A. No, sir.

Q. Or '33?

A. No, sir.

Mr. Boylan: If the Court please, I object to that as immaterial and not proper cross-examination. If I remember aright, the witness testified that he was there in 1931 and '37.

Mr. Hicks: I asked him if he made any investigation in that [203] year.

The Court: Well, he couldn't if he wasn't there.

Q. (By Mr. Hicks): Well, as I understand, you know only about this grain tract in 1931?

A. That is correct.

Q. And I believe you said you were there in '37?

A. Yes, sir.

Q. You were not there in '34?

A. No, sir.

Q. Did you find any grain grown on that tract in '37, Mr. Toucey?

A. No, sir.

Q. In your years of experience on Malheur Lake you are familiar with the soil qualifications down there where the grain is grown?

A. Yes, sir.

Q. Now, state whether or not this soil here for hundreds of acres is not identical in character and texture with the areas that you found the grain growing on in 1931?

A. Why, that is probably true.

Q. Now you may resume the stand. Now, tell the jury about the kind of crop that you observed growing on that land in 1931.

(Testimony of Bert J. G. Toucey.)

A. They were very good appearing grain crops to me. I mean I was not qualified at that time, or I am not qualified now, to judge as to how good they were. I heard that they got good [204] yields off of them.

Q. You heard what the yield was?

A. I don't know now.

Q. What kind of grains were growing on these fields that you have identified?

A. Well, there were oats and barley. I believe there was some wheat. That is, I can't now say which was grown, and I will say this, that only on the western edge of that grain field did I actually do the mapping work. The stuff further on to the east was done by other parties and I only went through that area once or twice. My detail work was done down to the west and south.

Q. Now, in your experience in your life, Mr. Toucey, I assume you have seen lots of grain that is growing, oats and the types of grain you have mentioned? A. I have seen quite a few.

Q. I want you to tell the jury whether in your whole life you ever say a finer crop of grain than you saw growing down there in 1931? A. Oh, yes.

Q. You say you have? A. Yes, sir.

Q. Where? A. Down on Tule Lake.

Q. Tule Lake? A. Yes, sir. [205]

Q. Are you familiar with Tule Lake, Mr. Toucey?

A. I was at Tule Lake in 1932 and did a limited amount of work in that area.

(Testimony of Bert J. G. Toucey.)

Q. And that is lakebed land, too, is it?

A. Yes, sir.

Q. Very rich land? A. Yes, sir.

Mr. Boylan: If the Court please, I object to that as immaterial, not proper cross-examination.

The Court: Objection sustained.

Q. (By Mr. Hicks): What do you say about the qualities of this land, Mr. Toucey, as to fertility, texture, and general soil qualities?

A. Well, I am not a soil expert. It is comparable, but does not have the water control.

Q. Now, the first time you were there was in '31. Were you there during the wintertime of 1931?

A. I only was down in the vicinity of the lake. I was not on this tract in the winter of '31.

Q. You were not; so you would not be able to inform us concerning the feeding conditions there during that winter, would you? I mean you were not there that winter, as I understand, on this tract?

A. I was in Burns, but I was not on this tract of land.

Mr. Hicks: That is all. [206]

Mr. Fuller: That is all.

(Witness excused.)

Mr. Fuller: Call Mr. John Scharf. [207]

JOHN SCHARF

was thereupon produced as a witness in behalf of the plaintiff herein and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fuller:

Q. Mr. Scharf, by whom are you employed?

A. By the Fish and Wildlife Service.

Q. And in what capacity?

A. As superintendent of the Malheur Refuge.

Q. And where do you reside?

A. I reside at what is known as the Sod House, about 34 miles from Burns.

Q. Where is that with reference to Malheur Lake?

A. Well, that is just about a mile south of the south shore of Malheur Lake.

Q. And is that within the area comprising the Malheur National Wildlife Refuge?

A. Yes, it is.

Q. How long have you been superintendent of the Refuge.

A. I have been superintendent since January, 1938.

Q. Were you employed in any other capacity prior to that time? A. Yes.

Q. What was that?

A. Well, I was Assistant Superintendent from August 1, 1935, [208] until January 1, '38.

Q. Was 1935 the first time that you came in contact with Malheur Lake? A. Yes, sir.

(Testimony of John Scharf.)

Q. And you have been in continuous contact with it from 1935 until the present time?

A. That is right.

Q. Are you familiar with this particular tract of land that is the subject of this condemnation suit?

A. Yes, sir.

Q. How long have you known this particular tract of land?

A. Well, if I recall, the first time that I was on this particular tract of land was either in August or September of '35.

Q. Will you describe the conditions as you found them in August or September of 1935, as relating to this particular tract of land?

A. Well, on my first trip there I came through from the east by horseback and rode through just below the house of this particular tract and——

Q. Just a minute. Now, where is that house that you are referring to?

A. Well, that house is on the upland, very close to the Neal survey line, or the meander line.

Q. All right, go ahead, then. [209]

A. I came through that tract from the east and, as I recall, went down along the west fence to where I crossed the fence, and I am not sure that I went through a gate or I just rode over the fence, going toward the Hob Graves windmill.

Q. What was the condition of that land that you saw at that time?

A. The part that I saw was quite dry and wind-blown.

(Testimony of John Scharf.)

Q. Were there any crops growing upon that land that you saw?

A. I don't recall that I saw any agricultural crops on that particular land.

Q. Did you see any grain grown at that time?

A. Well, on that trip, but not on that piece of land.

Q. Since 1935 have you been upon this land at any time?

A. Yes. I couldn't say that I have been on it each season specifically, but I have been in the general vicinity, and perhaps most seasons I have been on a part of it.

Q. Have you ever seen, at any time, grain growing upon this particular tract of land?

A. No, I have not.

Q. Do you know what the water condition has been upon this particular tract of land, I mean as to the level of it, within the past year, how high the water raised?

A. Well, I know, yes, how far it has been on the land. I am not familiar with the contours in that particular section, but I know generally the area that has been wet. [210]

Q. Could you tell me what area on that—could you come down and point out on the map what area has been wet this past year?

A. Well, this area in here (indicating) received some early water, sufficient for a crop, and then the water has receded off slowly this summer as it evaporated, and this low area, I imagine that this line in

(Testimony of John Scharf.)

here (indicating) would perhaps mark pretty closely the area that remained wet quite late, later than is consistent with growing a hay crop.

Q. Did that condition prevail pretty uniformly for the past five or six years?

A. Well, it is dryer this year than it has previously been since about '41 or '42.

Q. '41 or '42 was a wet year?

A. Well, '42 was quite wet and '43 was extreme high water.

Mr. Fuller: '43. You may resume the stand. I believe that is all.

Cross-Examination

By Mr. Hicks:

Q. Mr. Scharf, referring to the water condition, did I understand you to say that you were on this tract earlier this year?

A. Yes, I was there this spring.

Q. And observed the water condition?

A. Well, I was down to the water's edge, yes.

Q. About what time were you there this spring, Mr. Scharf?

A. Oh, I would judge in April or May. [211]

Q. And just there the one time?

A. Well, I was there a number of times, but relatively close together.

Q. Well, now, that was the time of about the high water, wasn't it?

A. Well, it would have been, yes, that is right.

Q. And then tell the jury with what rapidity the water recedes from this land?

(Testimony of John Scharf.)

A. Well, it varies. Some years we have—during what we consider to be a normal runoff, why, our high water in the lake, since I have been familiar with it, has been along in May and June, and usually June is our high-water month for high-water peak; then it recedes, some years quite rapidly, other years more slowly, depending on the amount of flow of the two streams running into it. This year the flow was very short from both streams and the rapidity of the recession was much more rapid than what we think or refer to as being normal.

Q. Now, you mention the Blitzen and the Silvies Rivers. State whether or not the Blitzen comes in on the south and west of the Cole Island dike, is that right? A. That is right.

Q. And the Silvies River comes in on the north and likewise west of Cole Island dike?

A. That is right.

Q. And state whether or not all the water that comes into the [212] Malheur Lake comes in west of the Cole Island dike?

A. Well, not all, but a substantial part of it does.

Q. Would you say that ninety-five per cent of it does, Mr. Scharf?

Mr. Boylan: If the Court please, I object to that as not proper cross-examination.

The Court: He may answer.

A. Well, of course, it would be just a gross estimate on my part as to what percentage it was.

Q. (By Mr. Hicks): Do you know any other streams that feed Malheur Lake?

(Testimony of John Scharf.)

A. No live stream, no. Some years there is a considerable amount of water comes in from Malheur Slough, which is in the northeast corner of the lake.

Q. Now, I understood you first came there in 1935? A. That is right.

Q. Now, this dike was not up at that time?

Mr. Boylan: If the Court please, I object to that as not proper cross-examination.

Mr. Hicks: Your Honor, he undertook to testify to the water conditions.

The Court: Yes, but I don't know what that has to do with it. I will sustain the objection.

Mr. Hicks: May I make an offer of proof?

The Court: Oh, yes. [213]

Mr. Hicks: Under the usual conditions?

The Court: Yes.

Q. (By Mr. Hicks): Now, as I understand your testimony, Mr. Scharf, you saw this land in 1935, when you rode across there horseback?

A. That is right.

Q. Where did you leave from that day?

A. Well, I left from the Sod House Ranch.

Q. And you rode in which direction across this land?

A. Well, I rode out across the east portion of the lake around by Cane Island, where it has been referred to as the lake shore, around by the mouth of Silvies River, across up through by the Cupola House and back across by the Dick Hayes windmill, across to the Gardner place.

(Testimony of John Scharf.)

Q. Do you remember for what purpose you made that trip?

A. Well, primarily to get acquainted with conditions and the people and the country.

Q. And you rode through and over dozens and dozens of tracts of land?

A. Well, a considerable number, yes. I wouldn't say exactly the number.

Q. And that was twelve years ago?

A. Yes.

Q. And did you take any notes of your observations that you made at that time? [214]

A. Well, as I recall, the only notes that I took at that time was a cattle count or two that I made on some of these particular areas.

Q. What time of year was that that you made that trip, Mr. Scharf?

A. Well, that was either August or September.

Q. Did you go over it that winter to find out how many cattle were grazing down there? Or did you?

A. No, I can't remember that I did. I was down there a number of times in the winter, but at that time I was in charge of construction work and didn't have too much to do with——

Q. And, of course, at that time you did not know exactly what this tract was, because nobody did?

A. That is right.

Q. Did you find the tract down there fenced?

A. Well, there were old fences all over the lakebed.

(Testimony of John Scharf.)

Q. Well, are you able to tell the forage and other conditions all over this tract?

A. Well, just in a general way, that is all.

Q. It would be in a very general way, wouldn't it, Mr. Scharf?

A. Well, yes. At that time of year it had been pretty well grazed over and it would be quite dry. About the only forage that was left there that I saw was dry foxtail.

Q. And you mentioned that there was an area down there from which the water had receded, and so forth, and had a very [215] sparse growth down in, I believe it was this tract, wasn't it, Mr. Scharf?

A. Well, yes.

Q. I want to ask you whether or not, the many winters that you have seen there on the lake, those plants, after the water has receded, the plants will grow even through the wintertime down on Malheur Lake?

A. Well, of course, I think that is a matter of opinion.

Q. Well, I am just asking your opinion, from your observation.

A. Yes, it has been my observation that if fox-tail is protected by some growth and gets a start in the fall that it will at least remain green throughout the winter, and if the weather is favorable, will perhaps grow some.

Q. Mr. Scharf, have you ever been on this Hayes tract of land in the winter to ascertain the number of cattle that were wintering on it?

A. No.

(Testimony of John Scharf.)

Q. Have you ever been on this tract of land during periods of time when Malheur Lake is blooming at its best to ascertain the crops that were appearing on that tract of land?

A. Well, I have been on there when it was necessary to walk out there on account of water, if that is what you have reference to.

Q. You know the water recedes down there, don't you? A. Yes. [216]

Q. I am asking you, have you ever been on the Hayes land after the water has receded and it has been irrigated to ascertain the kind of crops and the quality that were appearing on the land?

A. Yes.

Q. All right, I want you to tell the jury about it.

A. Well, I have been in that general vicinity and on this particular tract a great number of times with regard to fence repair, and general observations, and this tract, when the conditions are right, supports a considerable amount of forage, such as the coarser grasses and salt grass; on the uplands, some of the better grasses, like the bluejoint, where the moisture conditions are proper. On the low lands there's some of the wide-blade sedges, the jonquils or watercress. I have seen a very limited amount of sugar grass, rather dense tule growth or flags or type of burweed.

Q. You have seen some wonderful hay crops on this particular tract of land, too, haven't you?

A. Well, I wouldn't call them wonderful, but they have been very good, yes.

(Testimony of John Scharf.)

Q. The kind of crops that cattle will do well on?

A. Yes, if the cattle get enough of it and get enough to drink they will sustain themselves on it.

Mr. Hicks: That is all.

Mr. Fuller: That is all.

(Witness excused.) [217]

Mr. Boylan: Mr. Woodward.

DOREN E. WOODWARD

was thereupon produced as a witness in behalf of the plaintiff herein and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boylan:

Q. Mr. Woodward, what is your business?

A. I am a land valuation engineer employed by the Fish and Wildlife Service of the United States Department of the Interior.

Q. How long have you been in that employ?

A. I have been following the same work since 1930.

Q. And what are your duties with reference to that employment?

A. At the present time I am supervisor of lands in Region 1, which embraces six Western states. The duties of that position involve the administration of all acquisition work, the appraisal of lands, and contracts, and, in a general way, supervision over surveys and maps.

(Testimony of Doren E. Woodward.)

Q. You have had some experience, then, in appraising real property?

A. A great deal of experience, yes.

Q. And over what period does that extend?

A. Since 1930.

Q. Has that been a continuous experience as an appraiser?

A. Yes. There were two years in the service I didn't do much [218] appraising.

Q. And during that time did you appraise a considerable area of land?

A. Well, I haven't totalled it up, but it would amount to millions of acres and several millions of dollars.

Q. And over what area did you operate?

A. Primarily west of the Rockies. Some of it has been as far east as the Mississippi.

Q. Have you had experience in appraising land in Oregon? A. Yes, sir.

Q. And particularly with reference to Malheur Lake and Harney County, Oregon?

A. Yes, sir.

Q. What experience have you had in appraisal of land on Malheur Lake?

A. Well, I have personally made appraisals here, mostly since 1941, off and on.

Q. Have you been on the lake at various times since 1941?

A. With the exception of '44 and '45.

Q. That was during the time you were in the service? A. Yes, sir.

(Testimony of Doren E. Woodward.)

Q. Now, are you familiar with the tract which is known as Tract No. 17 on Malheur Lake, which is the land under condemnation in this action?

A. Yes, sir. [219]

Q. Have you been upon that land at any time for the purpose of making an appraisal of it?

A. Yes, I have.

Q. When?

A. Well, the first time to make a specific appraisal of it was just about a year ago now, and I visited the tract several times this year.

Q. How much of a place is this? How many acres in this tract of land?

A. In all, there is a little over 1101 acres.

Q. Will you describe to the jury, in a general way, what this land consists of?

A. That is most easy to do by dividing it into the uplands and the lakebed lands. The uplands at the north end have a little rabbit brush and grass and some native meadow. Just about the center of the land there is a large greasewood knoll, lying northeast and southwest, that occupies, I would say, about sixty, maybe sixty-five acres. That is fringed with salt grass and blue-joint now, and sometimes mowed for hay. The west forty is ordinarily a mud flat covered with forbs and weeds or rushes, but this year for the first time to my knowledge has a small oat field in it. To the east the land has been utilized as wild hay meadow. Within the lakebed there is one area of 320 acres which is referred to as Special

(Testimony of Doren E. Woodward.)

Master Tract 48, which is primarily grazing and hay lands. There is another area just [220] west of that that is grazing and marsh. That is down to about the 90-foot contour, I believe; and from there south it is water or mud flat, depending on the elevation, and tules.

Q. Well, now, Mr. Woodward, you speak about the upland; what is the dividing line, if any, between the upland and the lakebed?

A. It is the north meander line that is shown on the ground at this time by a good fence.

Q. Are you familiar with and do you know what Special Master's Tract No. 48 is?

A. Yes, sir.

Q. What? A. Yes, sir.

Q. Will you step down to the map, if you please, and point out the lands that you designate as the uplands and also the lands designated as Special Master's Tract No. 48?

A. These are the uplands, here is the meander line, the Special Master Tract 48 following east-bound to the south, southwest, southwest, and north to the point where it joins the meander line again, the area in here (indicating).

Q. That is an area within what is designated as the lakebed?

A. That is entirely within the lakebed.

Q. You may resume the stand. Do you know the number of acres in Special Master's Tract No. 48?

(Testimony of Doren E. Woodward.)

A. It is my recollection there's 320 acres in that tract.

Q. Now, in this case, Mr. Woodward, for your information, as [221] shown by the files in this case, on the 11th day of February, 1947, the Government filed in this court a Declaration of Taking for the full fee simple title to this tract of land which is designated as Tract No. 17, reserving to the owner at that time the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and the Special Master Tract No. 48 in the bed of Malheur Lake, for the period of five years from October 9, 1946, in accordance with the rules and regulations of the Secretary of the Interior. I will ask you whether, from your examination of this tract of land and this Special Master's Tract, the whole thing, and from your experience as an appraiser, you formed an opinion as to the fair market value of this tract of land known as Tract No. 17, with the reservation for the five-year period of the upland, of the surveyed land, and the Special Master Tract No. 48, as I have read it to you from the complaint?

A. Yes, I have.

Q. And, in your opinion, what is the fair market value of that tract of land with that reservation as of February 11, 1947?

A. Ten thousand eight hundred dollars.

Mr. Boylan: Cross-examine.

(Testimony of Doren E. Woodward.)

Cross-Examination

By Mr. Hicks:

Q. Now, Mr. Woodward, you first went with the Fish and Wildlife [222] Service, when was it?

A. Well, in 1930, but at that time it was known as the Biological Survey of the Department of Agriculture.

Q. In 1930 you went with them, but of course the name was later changed to the Fish and Wildlife Service, is that right?

A. That is correct, through various consolidations and reorganizations.

Q. With the exception of the two-year period, you have been engaged rather continuously in behalf of the Fish and Wildlife Service, is that true?

A. For eighteen months or two years prior to my entering the service I did appraisals at the request of and for the Navy Department.

Q. Yes. Now, Mr. Woodward, in connection with your duties, I take it that part of your duties is to appraise lands, is that right?

A. That is correct.

Q. And then your major duty is to try to acquire lands from the people that the Government is taking it from, is that correct?

A. That is the duty of my office, yes.

Q. Yes; and you, too,—you go around to the kitchen doors and talk to the folks, don't you, Mr. Woodward?

A. That is true.

Q. And you appraise these lands for a very special and particular purpose, don't you, all of them? [223]

A. No.

(Testimony of Doren E. Woodward.)

Q. Well, now in appraising lands, Mr. Woodward, I want to ask you whether it is not important in making your appraisals to know the history of the land and to know what it has produced and what its utility has been?

A. That is true, in as far as it can be determined.

Q. Yes. Now, did you, in connection with the appraisal you made on this tract, ascertain before you made that appraisal and before you came to this courthouse today what that land has been used for for the last forty years, right up to the present time?

A. Yes. I did not make specific inquiry, but I have talked to the Hayeses and to others who are familiar with that part of the land. I don't know that it was forty years back.

Q. Well, did you find out the number of cattle that were wintered on this tract winter after winter?

A. I was told numbers of cattle that wintered on the lakebed, but I am not convinced that they were on this tract.

Q. And you learned about the grain crops that were grown down there, did you?

A. I have no information, except for the grain that is there this year, of grain being grown, other than that small surveyed area in 1931. Now, the lakebed tract was not demarcated until the adjudication of 1944, and so prior to that time it was diffi-

(Testimony of Doren E. Woodward.)

cult to say whether a grain crop was on a given parcel or [224] not.

Q. Well, of course, you knew the area, you have known since 1931 the area, that this tract was on? A. In a general way.

Q. Now, in making your inquiry concerning the production history of this tract of land did you go to Bell Hayes and Marcellus B. Hayes to find out what had been done on the tract through all the years? A. They told me that, yes.

Q. They told you the kind and the volume and quantity of crops that they got down there on that tract year after year, didn't they?

A. That is true, but, as I have told you previously, I was not convinced that it was on this tract.

Q. Oh, they pointed out the areas and places then and there right immediately south of the tract, didn't they?

A. Special Master Tract 48, but this tract goes much farther south than that.

Q. Well, didn't you discuss this tract on further south with them, too, Mr. Woodward?

A. Oh, yes.

Q. And they told you the production that developed there through all the years?

A. They spoke of grain fields, but, as I said, my only specific knowledge was that surveyed field and no one knew the boundaries [225] until 1944, so I think you will excuse me if I am skeptical as to their allegations of what took place when they didn't know the boundaries until 1944.

(Testimony of Doren E. Woodward.)

Q. But they were living right about there, Mr. Woodward, from year to year, been on there for forty years. Don't you think they knew what these areas were after they were finally delineated?

A. I am doubtful.

Q. Well, anyway, you would not accept that history of the crops that were grown on the place?

A. Not verbatim, no.

Q. Now, answer me this: How many times in your whole life have you ever been on this tract?

A. Well, I hesitate to set an exact number, but I would say six or eight.

Q. And do you suppose in your whole life you spent as much as an entire day, with all of that time lumped together, on this 1101 acres?

A. Oh, yes, more than that.

Q. A day and a half?

A. I would guess two or three days in all.

Q. Ever been down there in the wintertime, when the cattle were wintering on these and adjoining lands?

A. Well, I came down there once in the early spring, but couldn't get to the land at all. [226]

Q. I am asking you about the wintertime.

A. Well, that is the only time I have been down there.

Q. In connection with your investigation of grain crops on this land, did you find out the yield?

A. I was told by, I think, Mrs. Hayes, one of the Hayeses, what the yields of the grains in the lakebed were.

(Testimony of Doren E. Woodward.)

Q. Yes; and you know that as a matter of general history about the yields, don't you, Mr. Woodward? A. In the lakebed at large.

Q. Well, is there any difference between the lakebed at large and this land that we are talking about here, and the big grain yield?

A. The big grain yield is in a lower elevation than this land.

Q. How far? A. About a foot.

Q. Land of the same texture as the other land that we are talking about?

A. As far as I can see.

Q. I wonder, Mr. Woodward, if you would step down to the map and, with the Court's permission, outline on the map this so-called Master Tract No. 48? Maybe a pen is better.

The Court: Here is a red pencil.

(The witness here placed some marks upon the map.)

Q. (By Mr. Hicks): Now, all right, you may take the stand, I believe that tract comprises 320 acres? [227]

A. That is my recollection, yes.

Q. I believe you noted it as hay and grazing land? A. That is true, for the most part.

Q. Meadow land, is that what you call it?

A. Low-grade meadow.

Q. Low-grade meadow? A. Yes.

Q. Now, how many acres of hay land is there within that Master tract?

(Testimony of Doren E. Woodward.)

A. Well, I will tell you in a minute. There would be about—well, I didn't break it in two. I classified it as grazing and hay, 280 acres.

Q. Now, you appraised that with a view to ascertaining a reasonable rental value, did you, for a five-year period? Is that what you were doing?

A. That was necessary, yes.

Q. And did you check that particular tract, Mr. Woodward, to ascertain how many tons of hay per acre were grown on that tract through the years?

A. Oh, yes, then I tried to apply my knowledge of the lakebed to it also. The volume may vary every year, almost, because of the fluctuation of the water level.

Q. Yes, but there is what we call a norm. From year to year,—was up until 1935, wasn't there, to your knowledge?

A. That is before my time. [228]

Q. Yes. Did you find any part of this Master tract at all, Mr. Woodward, that would not grow good crops of hay?

A. Yes.

Q. What part?

A. There is a little pothole or sump near the northwest corner that is too low. It is usually in mudflat or tules.

Q. And that is the area that would not grow hay, to your knowledge?

A. That is the area that I do not believe would ordinarily grow hay.

Q. With the exception of the little tract of about forty acres that you mentioned?

A. Yes.

(Testimony of Doren E. Woodward.)

Q. And you described that as meadow hay land, excepting the part that you accepted?

A. Yes.

Q. Now, for the purpose of your over-all appraisal, I assume you arrived at a figure as to the value of that hay land as of February 11, 1947, didn't you? A. Yes, sir.

Q. What value did you put on it, Mr. Woodward?

A. Well, on that in Special Master Tract 48?

Q. Yes, just that?

A. That would be \$4200.

Q. I mean how much per acre? [229]

A. Fifteen dollars.

Q. Fifteen dollars an acre for meadow hay land, is that right?

A. That quality of meadow hay land, yes.

Q. Now, I take it you have never yourself examined the haystacks and the hay that has come off of that that you call the Master tract, the 320-acre tract?

A. Well, yes, I have, the last two weeks or so, observed particularly the area that is mowed and rake-bunched down there, more than I had ever seen before.

Q. Yes, but I mean haystacks. You have never seen any haystacks on there?

A. I haven't seen a stack on the place that I can recall.

Q. And tell the jury about the kind and quality of hay that you saw down there this year, Mr. Woodward.

(Testimony of Doren E. Woodward.)

A. Well, this year the meadow type north of the greasewood knoll is much poorer than it was last year. Near the house, on the south end of the greasewood knoll, there is some good bluejoint that was not mowed,—I don't know why—but in the area along the meander line there is some average hay meadow, and a little to the south. In the northeast corner there is a little what I think was intended to be a grain field, but it didn't get much higher than foxtail, and, for the most part, in the south end of the lakebed it is tules and cattails and wire grass.

Q. I was asking you about the Master tract.

A. Excuse me.

Q. When you mentioned that there was some little peat hole there, that was not in meadow or hay land, how many acres in that?

A. About forty.

Q. That would make about 280 acres, would it, of these meadow hay lands?

A. In Special Master Tract 48, yes.

Q. Now, I am going to ask you how many acres of hay land, of the meadow land, outside of Special Master Tract 48?

A. The area immediately west of the Special Master Tract 48 is distinctly comparable, and I put the same valuation on that.

Q. You put a \$15 valuation on that hay ground, too, did you?

A. On that type of vegetation.

(Testimony of Doren E. Woodward.)

Q. All right. Now, what value did you put on that part up above that has the greasewood on it, the sagebrush, that 80-acre piece, or whatever it is?

A. Now you want the entire upland piece?

Q. Yes.

A. You have mentioned several things there, Mr. Hicks. Do you want the whole upland?

Q. If that will be more convenient.

A. Well, I classed as \$2 land rabbit brush and greasewood, 84 acres; and——

Q. Just a minute. [231]

A. That is \$168.

Q. One hundred sixty-eight dollars for 84 acres of greasewood grazing land, is that right?

A. Well, of the greasewood only has virtually nothing on it.

Q. Doesn't it have salt grass on it?

A. Just on the edges.

Q. Two dollars an acre. All right.

A. And I classed as meadow sixty-two and a fraction acres, 62.68, at \$20.

Q. That is the meadow hay land?

A. On the upland.

Q. Yes.

A. Twelve hundred fifty-three dollars and sixty cents. And then 27 acres has weeds and forbs,—it is on the west forty—at \$10 an acre, \$270.

Q. Let me interrupt you there. That 27 acres, that has a high quality forage on it, doesn't it, Mr. Woodward?

(Testimony of Doren E. Woodward.)

A. Well, this year it is, part of it, in oats.

Q. Oh, you put the grain land in that has the grain growing on it at \$10 an acre?

A. That is right.

Q. Mr. Woodward, do you know something about the grain situation? I mean grain land and grain production, and that sort of thing?

A. Well, I suppose it is safe to say I know something. It is a very loose question. [232]

Q. You saw the crop growing on this tract of land, didn't you, down there? A. Yes.

Q. And there's about thirty or thirty-five acres of it? A. How much?

Q. Thirty or thirty-five acres of it?

A. No, I don't believe so.

Q. How much would you say?

A. About sixteen.

Q. And you saw a stand of oats on it?

A. Yes, sir.

Q. And what quality stand was it?

A. It appeared to be very good.

Q. Very good, a very good stand of oats. From your experience in the oats business, or in the grain business, from your knowledge as an appraiser, could you tell us what could reasonably be expected from just one year's production on one of those acres which you appraised at \$10?

A. Maybe—

Mr. Boylan: If the Court please, I object to that as improper cross-examination.

The Court: Objection sustained.

(Testimony of Doren E. Woodward.)

Q. (By Mr. Hicks): I believe you said, Mr. Woodward, volunteered, that you had never seen oats or grain growing on that tract before; is that correct? [233]

A. That is correct.

Q. Have you ever been right at that place before, to ascertain whether grain had been grown on that before?

A. I was right on that exact place wading through mud last year.

Q. No grain on that last year?

A. Oh, no.

Q. That was a mudflat last year, wasn't it?

A. It had a growth of weeds and forbs coming on it which would furnish succulent feed.

Q. But that was mudflat last year?

A. Yes, sir.

Q. And this year you saw the grain growing on it?

A. For the first time in history.

Q. The first time you had seen it?

A. Yes.

Q. Now, speaking about history, were you down there in '31 and saw the grain growing there on what you call mudflats?

A. No, sir.

Q. Were you on there in '34?

A. No, sir.

Q. In '35?

A. I was on there in 1935, yes.

Q. You saw some of this same character of ground that was growing grain? [234]

A. Yes, there were large areas of mudflats that were——

Q. Now, referring to this area that Mr. Toucey told us about——

(Testimony of Doren E. Woodward.)

A. If I may, please, approach the map? The light is now so poor that I can't see what he is pointing to.

Q. Yes, that is all right. What valuation did you put on this land down below here (indicating)?

A. Seven dollars an acre.

Q. Now, in your experience, Mr. Woodward, in appraising lands for the Fish and Wildlife Service and the Biological Survey, I want to ask you if you ever have seen any richer or finer land in your whole experience than you find in that land that you appraised at \$7 an acre? A. Yes.

Q. Where?

A. Well, many places. In Iowa, for instance.

Q. Was it lakebed land?

A. You didn't ask me that.

Q. I am asking you if it was lakebed land?

A. No.

Q. Well, you say it was better land than this?

A. Yes, sir.

Q. Very much better? A. Yes, sir.

Q. Now, you have been more familiar with this tract in the last five or six years, have you? [235]

A. I have become most familiar with it since my return in 1946.

Q. Well, now, in the whole experience you have had with Malheur Lake since 1931, I believe you said,—or was it '35? A. '35.

Q. —has there ever been a time that you have been down on this tract, we will say, first, in the

(Testimony of Doren E. Woodward.)

wintertime, to observe the number of cattle that were being served in this area on this tract?

A. No.

Q. In your whole experience have you ever been down there on Malheur Lake when these tracts have been blooming that were growing, and so forth, and ascertained the growth of grasses and hay and forage, and so forth, that were on this tract?

A. I have been down there at different seasons of the year, but not during the winter, with that one exception. For appraisal purposes it is too difficult to accomplish in the wintertime.

Mr. Hicks: That is all.

Mr. Boylan: That is all.

(Witness excused.)

Mr. Boylan: Mr. Dryer, take the stand.

Mr. Hicks: Your Honor, I forgot to ask Mr. Woodward one question. Maybe I could do it another time. Maybe he won't have to take the stand.

The Court: No, you can't ask him a question unless he takes the stand. [236]

DOREN E. WOODWARD

thereupon resumed the witness stand as a witness in behalf of the plaintiff herein and was examined and testified further as follows:

Cross-Examination

(Resumed)

By Mr. Hicks:

Q. I wanted to get the reasonable rental value

(Testimony of Doren E. Woodward.)

that you put on this Master Tract No. 48 for the five-year period, which I believe you state you did appraise.

A. I did not appraise the Special Master Tract separately, because the reservation includes all the surveyed land and the Special Master No. 48, so I made a deduction for that.

Q. Would you give us that figure, please?

A. I took off \$932.

Q. Nine hundred thirty-two dollars is what you took off for that; and that represents the reasonable rental value on all of the deeded land and the Master Tract No. 48, is that right, for a five-year period from February 11th to——

A. Another four and a half years.

Q. Yes, for the full five-year period.

A. No, for the 4½-year period.

Q. Oh, for the 4½-year period; and that would embrace the 320 acres of land as you have described it, 280 acres of hay land, and the interest, and then all of the deeded land, including the hay land and all on the deeded lands?

A. That is correct.

Q. Nine hundred thirty-two dollars for the period of four and [237] one-half years, is that correct?

A. That is correct.

Mr. Hicks: That is all.

(Witness excused.) [238]

HORACE A. DRYER

was thereupon produced as a witness in behalf of the plaintiff herein and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boylan:

Q. Mr. Dryer, what is your business?

A. I am a real estate man, have an office in Portland, and I do general appraisal work.

Q. Where is your office in Portland?

A. In the Corbett Building.

Q. How long have you had your offices in the Corbett Building?

A. I have been in the Corbett Building since—it will be three years last January.

Q. Now, how long have you been in the real estate and appraisal business?

A. I have been in business in Portland since 1908.

Q. And tell the jury the extent of your experience as an appraiser.

A. Well, for the last fifteen or twenty years I have spent probably a third to one-half of my time in making appraisals of all types and characters of real estate properties. Those have included a number of buildings in Portland, apartment houses, and rather what we type commercial or business properties. Then I have done a great deal of work and specialized in farm land and have sold and operated my own land, sold a lot of land [239] for other people on a commission basis, and at present

(Testimony of Horace A. Dryer.)

I loan money in Oregon for a life insurance company and make those appraisals. Then I make appraisals for banks and other mortgage companies and private individuals.

Q. And I believe you stated you have been in that work as an appraiser for some fifteen or twenty years? A. That is right.

Q. Now, have you ever appraised any lands in Harney County? A. Yes, I have.

Q. And do you know where Malheur Lake is?

A. Yes, I am familiar with it.

Q. Have you made any appraisals of lands in the vicinity of Malheur Lake other than the appraisals on Malheur Lake itself?

A. Yes, I have. Within the last couple of months I have made appraisals of approximately—well, it is between sixty and seventy thousand acres of somewhat similar lands, particularly similar to what we call the high lands or the hay land and the sagebrush and greasewood, and such land.

Q. Now, are you familiar with that tract of Malheur Lake in the Malheur National Wildlife Refuge known as Tract No. 17? A. Yes, I am.

Q. Have you ever gone upon that tract for the purpose of making an appraisal of it?

A. Yes, I was.

Q. Now, will you tell the jury what you observed with reference [240] to the general characteristics of that tract of land.

A. Well, the upper portion of the land, as you drive into it by going through other lands you

(Testimony of Horace A. Dryer.)

come to a gate and through that is a rather small area, some—I have a map of it—some 75 acres of high land, that I class as just grazing land. It is principally covered with greasewood, and around the outer edges where the greasewood has died out there's indications that it shows some fair stand of salt grass pasture, and as you travel south, get down around the main buildings, to the left of the buildings and somewhat north is quite a sized area of land that has been mowed for hay this year, and on farther down you will find quite a large area of tules,—the ground is dry; there is no water there—but beyond that you go into another area that shows a little higher elevation than this area I just spoke of; it shows ribbons of areas that have been cut, apparently, following the better hay land areas that were cut for hay. Around on other spots there's considerable shorter grasses and considerable salt grass down in that grazing area, and from beyond that point on south for approximately two miles, from my observation, and getting as far south as I could to the mudflats or the tule area that is not so that you can go down on that land, I observed what I could see with a good pair of glasses, the rest of that land; and the first time that I visited this land I went out on the east line of this tract that I speak of that is near the lakebed and went on as far south and east as I [241] could get with a car. And then along the western boundary of this tract of land, as you come in and would be south of the greasewood area, is approximately a 40-acre tract,

(Testimony of Horace A. Dryer.)

about 15 acres, as near as I could determine the amount of land, that was cropped this year, was in oats, a considerable amount of foxtail around the edges of that, but over in the center of the oat field the crop looked fairly good. And lying directly south of the oat field is a sort of a water or wire grass—well, grass approximately six inches to a foot tall, that is dried up somewhat now.

Q. Now, Mr. Dryer, when was it that you made this inspection of this land?

A. I was on the land first about two weeks ago; then I was there again this week.

Q. And how much time did you spend on the land?

A. I was out there two weeks ago on two different days, and I was there—I was on the land two different days about two weeks ago, and I was there, I was on the land again this week.

Q. Well, did you spend some considerable time on the land, or did you just go on it and off again?

A. I spent a good deal of time on the land. I dug, made some soil borings of the high land and also of the lakebed area, and made what I thought was a thorough examination of the property.

Q. Did you find any greasewood on the property?

A. Yes, I did.

Q. Where was this?

A. Well, it was in the northwest corner of the tract as you go in the gate.

Q. And how much greasewood land did you find?

A. As I recall, around 75 acres.

(Testimony of Horace A. Dryer.)

Q. Do you know the significance of greasewood as to quality of the soil?

A. Yes, I do. A correction: There was 85 acres.

Q. What does the presence of greasewood indicate?

A. Well, greasewood areas all through, including this, indicate a heavy alkali in the soil.

Q. Did you see any evidence of alkali on this place other than just the presence of greasewood?

A. Yes, I found alkali generally all over this land.

Q. Now, are you familiar with Special Master's Tract No. 48? A. Yes, I am.

Q. Do you know where that is and the size of it?

A. Yes, it is approximately 320 acres that lies to the south and east of the house, that is where the old cabin is located.

Q. In this case, Mr. Dryer, as shown by the records in the case, the United States took the fee simple title to this land, or this tract known as Tract No. 17, on the 11th day of February, 1947, reserving, however, to the owners at that time the right to use in livestock ranching operations, such as harvesting of [243] hay and feeding stock, the surveyed lands and the Special Master Tract No. 48 in the bed of Malheur Lake for the period of five years from October 9, 1946, in accordance with the rules and regulations of the Secretary of the Interior. I will ask you whether you formed an opinion as to the fair market value on February 11, 1947, of this tract No. 17, the tract under condemnation here,

(Testimony of Horace A. Dryer.)

with the reservation of this five-year user in the prior owners? A. Yes, I did.

Q. What, in your opinion, is the fair market value as of that date?

A. Nine thousand nine hundred twenty-two dollars.

Mr. Boylan: Cross-examine.

Cross-Examination

By Mr. Hicks:

Q. Mr. Dryer, in addition to having experience as an appraiser, I understand that you loan money, is that right? A. That is right.

Q. And you sell insurance, too, don't you?

A. Yes, sir.

Q. How long have you been selling insurance?

A. Practically ever since I opened an office in Portland.

Q. Yes. Now, Mr. Dryer, you say that about a third or half of your time is put in in appraisal work. Isn't it a fact [244] that for about the last two or three months you have been appraising for the Fish and Wildlife Service, devoting most of your time?

A. No, I have been here in connection with several of these cases and was requested to make an appraisal of a number of these properties, which I did.

Q. Yes, you have been here in connection with all the cases, haven't you, Mr. Dryer? A. No.

Q. All the cases that have been tried?

A. No.

(Testimony of Horace A. Dryer.)

Q. Now, I am not going through this full routine with you, Mr. Dryer, but I want to ask you what valuation you put on the meadow hay lands that Mr. Woodward told us about, on which he put a valuation of \$15? I want to ask you what value you put on those? A. On the hay land area?

Q. In the Master tract, the 280 acres of meadow hay land?

A. I did not separate the Master's tract. I noticed that it was drawn out and indicated as a Master's tract on this map.

Q. Well, just tell us the value that you put on the meadow hay land, the irrigated meadow hay land.

A. I didn't find any irrigated meadow hay land.

Q. You did not?

A. No; I found 162 acres of hay meadow that I put in as \$25 an [245] acre, and that was my segregation of hay land from the tule land.

Q. Now, you first saw it this fall, as I understand it? A. This particular tract, yes, sir.

Q. You were on it those two times, off and on?

A. That is right.

Q. And spent those number of hours on the tract, I understand, which is plenty, I assume?

A. That is right.

Q. But did you, Mr. Dryer, talk to those people who had used the land for forty years to find out what it had produced in grain and the cattle that had wintered on it, year in and year out, for forty years? Did you inquire of those folks and inform

(Testimony of Horace A. Dryer.)

yourself concerning this land before you made this appraisal?

A. No; I have found that in matters of this kind oftentimes the information I get from the owners of tracts of land who are involved, that there's many informed people in the neighborhood who can supply me with full information on the facts and conditions, that, with my knowledge and years of experience, I determined what I thought this property was worth.

Q. Well, then, someone did inform you concerning this tract and what it has done throughout all the years?

A. This type and character of land generally, as to the yields, I did not find this extraordinary or any poorer than a lot of the other lands. In general, there's many acres very similar and alike to this land. [246]

Q. Well, then, you did not have any information concerning this tract to know what it has done through all these years for those people, is that true?

A. I observed this land, I observed the condition of the meadows. The land had not been plowed up. It is in its native state. I understand and have studied for some time prior to this appraisal the conditions of the Silvies and Blitzen Rivers, the runoff in the spring, the condition of the water, and all other conditions that, in my opinion, affect the fair market value of this property.

Q. Now, Mr. Dryer, you found some greasewood up on the deeded land, is that right?

(Testimony of Horace A. Dryer.)

A. That is right.

Q. And did you find any greasewood down below the meander line?

A. I found a spot or two that had died out.

Q. Now, tell the jury the dimensions of the spot of greasewood that you found below the meander line.

A. The dimensions?

Q. Yes. Was it an acre, or two acres?

A. Oh, I didn't measure that. I noticed a number of spots that it was very evident there that spots of greasewood had grown up there and then the high water had come in and no doubt had drowned it out; it was dead and still standing, and some of it still standing, in spots on the place. I found some [247] little spots of little dead greasewood, and where there were any signs of that there was also the signs of salt grass growing there.

Q. And was there as much as an acre of that altogether on the lakebed land?

A. I don't recall that there was any amount.

Q. Well, it wouldn't amount to a whole acre altogether, would it, Mr. Dryer?

A. Well, I didn't measure it.

Q. Now, there are in the lakebed, according to this map, 928 acres of lakebed land; is that right?

A. Well, I believe not. This particular piece of land where the small, little patch of oats is growing and that land in the elevation could be classed as lakebed land.

Q. Well, you know everything below the meander line is lakebed land?

A. Yes.

(Testimony of Horace A. Dryer.)

Q. That is 928 acres? A. That is right.

Q. And out of that 928 acres you found only about one acre that had some salt grass and greasewood?

A. That is right. Greasewood does not grow on the lakebed land.

Q. I understand this land had evidences of alkali all over? A. Yes. [248]

Q. The lakebed land? A. Yes.

Q. All right, now, you tell us what parts of that lakebed land show evidences of alkali, as to the spots that you mentioned?

A. I took some samples, dug down on the upland, on the upper bench land, and also on what we call the lakebed areas. I therefore made these soil tests and put this land out where it would aerate enough so we could see what it was like when it was dry. Those soil samples indicated a very, very heavy alkali, much more heavy on top than it was in the lakebed. In other areas there was a type of peat land that develops where there is a heavy tule growth that year after year breaks down and destroys and rots away. In there, in those peat areas, little round sort of peat holes, there is no alkali to speak of. In other words, it is indicative that you could probably grow successfully a lot of different kinds of crops, but the greater portion of this whole tract of land is a very heavy indication of alkali.

Q. Now you are talking about that land below the meander line, is that right?

A. I am talking about all the land that I was

(Testimony of Horace A. Dryer.)

able to get on. There is land in the mudflats and in the tules below that I was not able to get on.

Q. Now, when you say an indication of alkali, do you mean that that disparages the quality of this land? [249]

A. Most certainly it does.

Q. It does?

A. Yes, sir.

Q. Maybe you could tell us something about the quality of this land and its fertility and its capacity to produce crops of all kinds.

A. Not of all kinds.

Q. Now, Mr. Dryer, just forgetting about the ebb and flow of the water for a time, I want you to tell this jury any crops that this land won't grow.

A. Well, I haven't carried out an experimental operation on this farm, but my knowledge of land would tell me that there are many crops that you can't grow on this land.

Q. Now, is this the same character of soil that you find over by the place where John Scharf has his home there?

A. They could find a small piece of land down there and wash it out with water and do, probably, what Mr. Scharf has done.

Q. Now, it is the same land, it is the same lakebed land, is it not?

A. It certainly is not.

Q. Did you take samples of Mr. Scharf's land?

A. No, but I examined Mr. Scharf's garden spot, so I am familiar with what it is like.

Q. Are you able to tell this jury that there is one whit or one single grain more alkali in this lakebed land than there is [250] in John Scharf's garden?

(Testimony of Horace A. Dryer.)

A. Yes, sir.

Q. What do you say about it?

A. There is much more alkali. As a matter of fact, if there is anything in the information that I am able to obtain through Dr. Powers' office in Corvallis, when you find soils that carry more than seven or eight per cent alkali there are certain crops that will not do well and will not grow well in that land, and this land indicates to me—I didn't have time to test this soil—it is much heavier—part of this land—I am not trying to tell you all this land has that heavy alkali, but the majority of it does, except in the peat bed area.

Q. Then you are saying that this lakebed land—by the way, it is the same quality—the lakebed land has a common denominator and quality, doesn't it, throughout the area?

A. Well, you can define lakebed lands, you can find perfectly good soil, but if you don't find the components of climate and conditions and everything else that go with that land it is not successful as a farm project.

Q. But I am just talking about this land and its soil qualifications now.

A. I know you are.

Q. I am going to ask you whether or not, from your knowledge of this tract and other tracts on the lake, this land has not produced profusely grasses and grains and forage crops of all kinds, heavy, rank growth?

A. Yet I looked at some land down there through this dry area, the grass was about four or five inches

(Testimony of Horace A. Dryer.)

tall; it indicated that this year it failed to get water.

Mr. Hicks: Your Honor, may I have the answer stricken and have the question reread to him? It is not responsive.

The Court: No, no, it is cross-examination. You got the wrong answer and you must abide by it.

Mr. Hicks: Well, I want to ask the question again.

The Court: Well, ask him any question you want to, but when you ask him a question and he answers you, that settles it.

Q. (By Mr. Hicks): Now, Mr. Dryer, I am going to ask you whether or not, in the investigation you have made of Malheur Lake in the last couple of months, you haven't found it to be a fact that the lands of Malheur Lake, these lakebed lands that you classify as alkali, and so forth, if in their whole history, except during the limited period of a dry spell, they haven't grown grasses, grains, forage crops, sugar grass, and all that sort of things, in profuse and rank, heavy growth?

Mr. Boylan: If the Court please, I object to that as not proper cross-examination, not confined to the tract under condemnation.

The Court: Objection sustained.

Q. (By Mr. Hicks): Will you tell us whether there is one grain [252] or two grains of alkali in the soil in this tract, Mr. Dryer?

A. There's bucketsful of it.

Q. No, I mean on the grain bases that a chemist analyzes the soil.

(Testimony of Horace A. Dryer.)

A. I am not a soil analyst. I don't profess to be.

Q. Well, you don't know the quantity?

A. I know it when I see it.

Q. Now, you did find that same condition to prevail on the tract of oats that you saw growing down there?

A. I saw some alkali in some of those oat fields down there, yes, sir.

Q. Well, you only saw one oat field down there, didn't you, this year? A. Yes, sir.

Q. And that is the same alkali soil you have been telling us about?

A. There is some alkali, pretty heavy.

Q. You saw the oats growing down there?

A. Yes, sir.

Q. And it was pretty good oats?

A. In the center of the field it was very good.

Q. That alkali didn't bother the oats, did it?

A. No, but from the standpoint of farm land you don't take one crop in ten or fifteen years.

Q. And do you remember it as part of your history that even in [253] this lower area here it had grown grain, and heavy crops of grain?

A. I heard some testimony about it. I didn't see it.

Q. Well, coming back again to the soil question, do you say that the alkali condition is such in respect to this land that it won't grow heavy crops of grain because the soil quality isn't there?

A. Would you like to have me explain that?

Q. I want you to answer the question.

(Testimony of Horace A. Dryer.)

A. I say no. Now, if you will let me explain the answer to the question I shall.

Q. Well, go ahead and give your explanation.

A. From all the records I could find and from my observation of this land over many, many years, the river down there, the Silvies, has washed an alkali condition into this lakebed area, and as there isn't any particular outlet to this land after the elevation gets to about '91, for years and years, and years the alkali waters have settled in that basin and have dried, so that the aeration of the water has left the alkali and it is quite definite and prominent on top, and as you dig down through this soil you will find those layers. As years have gone by and you have a dry cycle, or a wet year and a dry year, you will find an erosion of land that has come down in the river, and if you will cut down through there with a shovel and dig it down you can even lay it out on the ground for just ten or [254] fifteen minutes in the sun and see little white layers of alkali in this land, indicating very heavy alkali.

Q. Well, will land of that character produce grain to the extent of seventy-five to a hundred bushels of oats to the acre?

A. It might now and then.

Q. Well, why will it do it one year and not another, with reference to the alkali?

A. For the simple reason that if you bring this water down, unless you have enough water to sluice this land out and break it down—in many of the areas where they have lots of water they can remove

(Testimony of Horace A. Dryer.)

the alkali from the land and continue to grow crops on it.

Q. Well, is this land and the alkali content such that it won't grow this rank growth of grasses and forage for livestock? A. It grows rank tules.

Q. I am talking about the grasses and feed for livestock.

A. I don't call tules good livestock feed.

Q. Mr. Dryer, do you know what the Taylor Grazing Act is and what it means to a stock rancher?

A. Yes, sir.

Q. Did you take that into consideration here?

A. Yes, I did.

Q. Now, one other question: What value did you put on the grain land where you saw the grain crop growing down there?

A. I put \$15 an acre on the full forty acres. [255]

Q. You found forty acres of that grain land, did you?

A. I just called that forty acres. Now, there's where your fifteen acres of oats come in. You were lucky enough to be able to plant them on that fifteen acres, but not on the rest of the forty.

Q. Did you measure that acreage to find out the acreage of those oats?

A. Well, I have seen enough land that I can tell fairly close, and there's about fifteen acres of oats in that field.

Mr. Hicks: No further questions.

Mr. Boylan: That is all.

Mr. Hicks: Oh, one further question: You found

(Testimony of Horace A. Dryer.)

some 160 acres of hay land that you put \$25 an acre on, is that right?

A. I took what I considered to be the best hay land on the place, which, in my segregation of the figures, took out the tule land that is involved in the hay field, and in my estimation there were 162 acres of hay land that I put a value of \$25 an acre on.

Q. That is the land that goes from one and a half to two tons to the acre?

A. I don't know that it would go two tons to the acre. Your average yield is near a ton to a ton and a quarter of good hay.

Q. Then what valuation did you put on the other hay land that was not quite as good as that, you said.

A. I included the tules in the balance of the land. I put [256] \$7 an acre on the tule land.

Q. And \$15 an acre on the land that was growing the grain? A. This year.

Mr. Hicks: That is all.

Mr. Boylan: That is all.

(Witness excused.)

Mr. Boylan: The Government rests.

(Plaintiff rests.)

Mr. Hicks: We rest, your Honor.

(Defendants Hayes rest.)

The Court: Ladies and gentlemen, it is my intention to submit this case to you tonight. It is now 5:15. I will consult your convenience as to whether

you want to have the arguments now and then go to dinner, or if you want to wait until after dinner and come back here at 7:00 o'clock and have the arguments and the instructions and then I will submit it to you. Now, I will give you just a moment to talk it over among yourselves.

(Short discussion off the record.)

The Court: All right, ladies and gentlemen, I will now excuse you until 7:00 o'clock this evening, and in the meantime do not speak of it among yourselves nor discuss it among yourselves or with other persons or remain in the presence of other persons who may be discussing it. You are now excused until 7:00 o'clock. [257]

(The jury was thereupon excused from the presence and hearing of the Court, and thereafter, in the absence of the jury, proceedings were had as follows:)

Mr. Hicks: Could I make my offers of proof, your Honor, before the jury returns?

The Court: Yes, you can if you want to.

Mr. Hicks: Should it be deferred until later?

The Court: As far as I am concerned, it could be deferred until after the jury goes out, and do whatever you want then.

Mr. Hicks: Very well, we will defer it.

The Court: Court is now in recess until 7:00 o'clock.

(Whereupon, at 5:20 o'clock p.m., September 25, 1947, a recess was had until 7:00 o'clock p.m.)

Evening Session—7:00 P.M.

(Oral argument was then addressed to the jury by counsel for the respective parties, and thereafter the Court instructed the jury as follows:.) [258]

INSTRUCTIONS TO THE JURY

The Court: Now, ladies and gentlemen, we have arrived at the final stage of this condemnation action filed against the land occupied by Marcellus B. Hayes and his wife in the action entitled *United States versus Marcellus B. Hayes, et al.* The witnesses have appeared before you and have given testimony and counsel have made arguments as to the value of this land and the interest that the Government is taking therein. The law reposes in the Judge of a Federal Court the necessity of summing up the rules of law which are to be applied in the determination of the facts of a case, and it is now my pleasure to give you such rules of law, as well, in this case, as certain comments of fact.

There are a good many things that come into the trial of a lawsuit which are not evidence, and it is upon the evidence as guided by the rules of law that you must base your determination.

In the first place, counsel have made arguments to the Court and to you. This is a privilege and duty of counsel, in representing a client, to make proper presentation of the facts and the law, and counsel on each side in this case have availed themselves of that privilege. In appraising the influence which the argument should have on you you must remember

that counsel are advocates, they are each employed to represent a client, one side the United States and the other side the land [259] owners, so, therefore, what they say is not evidence for your consideration. It is simply a partisan statement of their sides of the case. You are the sole and exclusive judges of the facts of the case and it is your duty to remember what you saw of this land and remember the evidence and appraise the land upon that basis, and the suggestions of counsel on either side need not be followed by you in arriving at the answer in this case. You may, of course, if you wish, in as far as the arguments are proper, give such weight to them as you choose.

Now, in the next place, there is the view. The view itself is not evidence, but it is given to you for the purpose of allowing you to see the conditions which are described, so that you will understand them, and, while you have a right to use a view to throw light on the testimony, it in itself is not evidence.

Now, this is an action for condemnation of lands brought by the United States against the defendants. The defendants, in this instance, own the property in fee simple, and the United States, under its sovereign power of eminent domain, for purposes which are legally proper, has taken appropriate steps to condemn the fee simple title to the whole parcel of land, subject to a reservation. The defendants do not question the right of the United States to take the property. As a matter of fact, this purpose, which has been developed by [260] the Congress of the United States through legislation and through

the executive departments of the Government, is a valid one and has been determined by the governmental bodies of the United States to be a proper and essential purpose for the benefit of all the citizens of the United States, and, therefore, even if you are not a hunter or directly interested in the maintenance of the wildlife, you must remember that this is a declared policy of Congress and that the services, the wildlife services, have been built up for the purpose of conserving this wildlife, which is assumed to be in some way essential to the national wellbeing. That purpose is not before you for questioning. Nor should you consider, in that connection, whether or not you have always been impressed by the way in which the matter may have been administered, whether or not you like the administrative policies or agents of the Government. This action in condemnation has nothing to do with those considerations. You must simply accept, as does the Court, the declaration of Congress that this is an essential purpose and that it is necessary, according to the declaration of the agents of the Government, to acquire this land in order to carry out the purpose.

Now, in this connection, in connection with the case, I have this further to say, that the law places the power in a judge of the Federal Court to comment upon the situation as he finds it with regard to the facts. I have two duties. I [261] have the duty to lay down the rules of law, and those you are bound to follow, whether you agree with them or not. In another respect I have the duty, if certain facts strike me as necessary to clarify, that I should make those as clear as possible, and in that it becomes nec-

essary for me to comment on a question of fact. In that connection, of course, you are the sole and exclusive judges of the facts and you are not bound to follow the suggestions that I may make to you in regard to the facts. When I do comment on a question of fact I shall make it very clearly as distinguished from a rule of law. But I want you to carefully consider any comments that I make for the purpose of correctly deciding this litigation.

Now the Court will proceed to give you the rules of law. There is only one question which you are to determine in this case. The question which you are to determine is, what is the just compensation which should be paid by the United States to the defendants for the property which has been appropriated as of the 11th day of February, 1947? The Government is given the right, as a sovereign, to take the private property of any citizen for proper governmental purposes. As I have said before, that right is unquestioned. However, the constitution of the United States provides that when private property is taken for governmental purposes just compensation must be paid therefor. The just compensation for property, where the United States has taken the fee simple title, subject, [262] as in this instance, to reservations, consists in the fair market value of the particular piece of land, considering its highest and best use, within a reasonable period of time, and subject to the reservation, which in this instance is very important.

Now, I have used the term "fair market value." Fair market value of real property means the full

price at which the land can be sold on the open market, subject to the reservation, for cash, assuming an owner willing to sell and a purchaser willing and able to buy—in other words, the price that would be agreed upon by an owner who wished to sell but was not compelled by circumstances to sell and a purchaser who wanted to buy land but who was not forced to buy this particular tract. Fair market value is just as intelligible, therefore, to you as it is to the person who wrote the dictionary, but probably I can make it a little clearer by making certain exclusions.

Fair market value does not mean such a price as the property would bring at a forced sale, such as sheriff's sale or sale on mortgage foreclosure, because you can see that that is not an open market. It does not mean a sale such as would be made where an owner was compelled by imperative necessity to get cash immediately. On the other hand, fair market value does not mean a fanciful price such as the land might bring under extraordinary and peculiar circumstances, or [263] a value for the purpose of speculation, or a remote, imaginary or uncertain value based on what somebody might want to get for it, because no consideration should be given, in arriving at fair market value, to the willingness or unwillingness of the defendants to give up their property, and no consideration should be given to any peculiar or special value which a particular tract of land might have in the mind of one of its owners, unless that value were reflected in what will be paid for it on the open market for cash.

The determination of fair market value of a piece of land is based upon its description, its history, the type and fertility of the soil, its location with respect to markets and other facilities, together with every other factor or circumstance which in the opinion of a seller or buyer would be given weight in negotiations for sale as adding to or detracting from the value.

The owners on parting with their property are entitled to receive just such amount as they could obtain if they could go out on the open market and offer the property for sale, subject to the reservation which they have made. To give them more than this would be to give them more than market value. To give them less than that would be to deny them just compensation.

Now, the fair market value is a question addressed peculiarly to your sound judgments as persons of affairs. The [264] experience that you have had in the business world is of value, and you have a right to apply it to this situation. You yourselves saw this piece of land, and when you consider the situation, everything that you have heard in the testimony about it, you can make up your own minds, without the benefit of expert testimony even, what its value would be if it were sold on the open market for cash.

Now, as I have said at times before in other cases, the lake itself is one of the great factors in appraising this particular piece of land, as it is on other pieces on the lake,—and I say now that this is comment of fact. I will review, to a certain ex-

tent, some of the testimony in regard to this matter, but, as I say, you need not follow me in this part of the instructions, because this is not strictly a matter of law, although there are some considerations that I shall suggest to you for consideration. The lake itself makes all the value that there would be to this tract of land. If there were no water in this area, the land would have practically no value. The lands on the border, on other portions of Malheur Lake, which the water does not cover at various seasons of the year, are of little or no value. That, I think, is inherent in the testimony in this case. The thing that adds uncertainty to the value of this land is the uncertainty of how much the land is going to be covered in a year by the water, and, as you have been advised, the water fluctuates. One year [265] it comes on early and stays late, perhaps; another year it does not come on at all. The testimony regarding raising of grain here is indicative of exactly that situation. They can only raise grain when they can get the seed in in time, after the water has left the land, so that the grain can mature during the growing season of that year. If the water does not recede from the land in time they can't plant. If it recedes from the land too late they can't harvest it, because the grain won't mature. That is the reason, as you all know, why there have only been certain years that they have been able to plant grain.

Now, if the water stands on this land during the growing season it won't even grow stock feed while water is there. It grows tules, although if it does

not completely cover foxtail and some other grass that has gotten a start the foxtail will grow, and, according to the testimony here, will sometimes grow all winter, after the water recedes.

So in all of this situation you have to consider the situation of this lake and as a purchaser who was thinking of putting out cold cash for this piece of land you would have to consider very carefully how much crop and how much hay you could raise on this land in a given year and how much you were going to be affected by the fluctuations of the water.

Now, there is another factor in this situation in this particular case, and that is the reservation, which, as I [266] have said before, is extremely important. The allegation of the Second Amended Complaint, which is not denied, is the estate taken by plaintiff in this proceeding for the public use is the full fee simple title to the lands described, reserving the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five years from October 9, 1946, in accordance with rules and regulations of the Secretary of the Interior.

Now, that map which is in evidence, which you will have with you in your jury room, has the upland marked on it in the heavy black lines, and one of the witnesses marked in red the part of it that constitutes Special Master Tract No. 48, so you will know from looking at the map exactly what

lands it was that they have reserved for a period of five years for certain specific purposes which I have read to you.

Now, in appraising this land and fixing its fair market value you have to consider that reservation. Five years is quite a period of time, and you would have to consider, as a purchaser going onto the open market and laying down cash for this land, how much you would pay for it in view of that reservation, because you would be excluded for five years from the livestock feeding operations upon this particular piece of land, and that would add, in my opinion, a considerable factor [267] in setting the purchase price that a willing purchaser who did not have to buy this piece of land would pay for it.

Now, at that point I mark the close of any comment of fact upon the part of the Court, and, as you will remember, you do not have to follow me on the question of comments of fact, although it is the law that you must consider this reservation in fixing the fair market value of this particular piece of land.

The testimony which you have heard as to the conditions on a piece of land or its history, its production, anything of that sort, are facts and evidence as to facts. Such evidence is binding upon you and you must give it full weight, subject to the credibility which you give to a particular witness.

On the other hand, considerable testimony has been given by various witnesses relating to the opinions of the witnesses as to the fair market value of the property under consideration as experts. Several of the witnesses have given an opinion as to the

value of the particular land upon the market. Such opinions, whether given by an expert testifying for the United States or for the defendants, are not binding upon you as is the sworn evidence as to a fact. It is true that the Court permits certain persons who have made studies of market conditions affecting real property in a particular area and who have investigated, who have had experience which the rest of us have not had, with regard to values of land, to [268] give such opinions, but they are only advisory to you and you are not bound to follow them. As a matter of fact, you can discard them altogether and proceed upon your own notions and your own ideas of value, so long as you stay within the sworn evidence as to facts.

Now, you should carefully weigh these opinions, however, and determine the qualifications of the particular witness to speak and give an opinion, and when you have determined how much weight you wish to give his opinion you may follow it if you desire, but you are not bound to follow it. You may, instead, use your own best judgment, based upon the evidence, and set the fair market value of this particular piece of land, subject to the reservation.

Now, there is a factor that I want to call your attention to in that regard, that the experts who testified for the defendants in this case did not testify as to the particular thing that the Government is taking. They testified to the full market value of the fee simple title to this piece of land, without giving any consideration whatever to the value of this reservation, and so in considering those opinions

you have to take that into consideration, that they entirely disregarded a very important factor, which was the reservation that was attached to this property. The witnesses, on the other hand, who testified for the Government gave full weight to the reservation and testified to much more value than they [269] would have given in the event that the reservation had been left out.

With respect to the reservation, I also call your attention to another factor, and that is that the higher the value you place on this land the higher the value you have to place on the reservation, because a reservation that only affects a five-years use of a part of a \$10,000 piece of land is an entirely different value than one that affects a \$50,000 piece of land or a \$40,000 piece of land, whatever you may give; but those factors have to be coordinated in some respect.

Now, in the ultimate, when you bring in a verdict, of course, it will represent your composite advised opinion as to the fair market value of this particular tract of land, subject to the reservation. Your duty, and your sole duty, is to fix the just compensation to be paid by the United States to the owners because of the acquisition of this land, subject to the reservation.

I have before spoken of the question of a quotient verdict. It would be improper for you to each of you figure up your notion of the value of the land, subject to the reservation, and then take the twelve opinions and add them together and divide it by twelve. That is a quotient verdict and the Court

would be required to set that aside, so do not follow that procedure.

And, furthermore, do not balance up, strike a division [270] between what the Government's experts have testified to on the one hand and the experts of the defendants on the other. I have warned you before that the experts of the defendants did not testify to the same thing as the experts of the Government, so it would be entirely improper for you to try to strike any balance between them.

The thing for you to do is to take all of the evidence which you have in the case and the view of the premises and what you know of land values and sit down and argue it out and set a fair value on this land, subject to the reservation. It is a complicated problem in some respects, but, nevertheless, one that you can settle by threshing it out among yourselves and without following any mathematical processes.

And, of course, you have been chosen as fair and impartial people, you have all sworn that you would be fair and impartial. Try to act just as conscientiously as you can and not regard any extraneous influences, one way or the other, about this case. I am sure that I can trust you with a determination of the matter without any difficulty, and it is with entire confidence that I submit the matter to you.

You are the sole and exclusive judges of the facts in the case and the credibility of all the witnesses. The power of judging the effect or value of evidence, however, is not arbitrary, but must be exercised with legal discretion and [271] in subordination to the rules of evidence.

The direct evidence of one witness as to a fact to whom you give full credit and belief is sufficient to establish any issue of fact in this case.

You are not bound to find a verdict in conformity to the declarations of any number of witnesses which do not produce a conviction in your mind as against the testimony of a less number or against other evidence or an inference from evidence which does satisfy your minds.

Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, the character of his testimony, the interest that he may have in the outcome of the case, or by evidence affecting his character or motives, or by contradictory evidence.

If you find that a witness has testified falsely in any one material part of his testimony you should look with distrust upon the other evidence given by such witness, and if you find that any witness has testified wilfully false you will be at liberty to entirely disregard all the evidence given by such witness, unless corroborated by other evidence which you do believe.

You will have with you in the jury room the exhibit which has been introduced in the case and one form of verdict, which, omitting the formal portions, I will read to you:

“We, the jury duly empanelled and sworn to try the [272] above-entitled cause, find the full, fair market value of the full fee simple title to the lands described in the Second Amended Complaint in condemnation and designated as Tract No. 17,

reserving the right to use in livestock ranching operations, such as harvesting of hay and feeding and grazing of stock, the surveyed land and Special Master Tract No. 48 in the bed of Malheur Lake, for a period of five years from October 9, 1946, in accordance with the rules and regulations of the Secretary of the Interior, and the just compensation to be paid for the taking of said lands, subject to said reservation, is the sum of \$.....”

In that blank space after the dollar sign you will fill in such amount as you find represents just compensation to be paid by the United States to these defendants for the taking of these lands, subject to the reservation.

“Dated at Burns, Oregon, thisday of September, 1947.”

.....,

“Foreman.”

Since this case is prosecuted in the Federal Court, ladies and gentlemen, you will have the verdict signed by your foreman alone, but it must represent the unanimous agreement of all of you as to the just compensation, therefore, before you return the verdict to court carefully check up to see that you are in agreement as to the amount that you fill in as just compensation.

Are there exceptions? [273]

Mr. Hicks: I assume they may be taken, your Honor, in the regular course?

The Court: Yes, I will give you the opportunity. Further matters? Swear the bailiffs.

(The bailiffs were thereupon duly sworn.)

The Court: You are excused, ladies and gentlemen, to deliberate on your verdict.

(The jury thereupon retired to consider their verdict.)

Mr. Hicks: May it please the Court, I want to note these exceptions:

Your Honor, I believe it was in the form of a comment, whether segregated or not I do not recall, but you did instruct the jury that with reference to those lands that are not touched by water or served by the ebb and flow of the lake such lands are of practically no, if indeed any, value. I simply point out, in that connection, that even the Government's own appraisers put a value of \$2 an acre on that land, and Mr. Howard, our own appraiser, put a value of \$10 an acre.

The Court: All those lands are touched by water. I am talking about lands of that type that are not touched by water, and what I said is true. I refuse to change it. You may have an exception.

Mr. Hicks: Then one other matter, your Honor, which was specifically a comment of fact: The Court pointed out to the jury the fluctuations of water elevations as a factor in [274] disparagement of the value of the land. I agree with your Honor that that is a factor. However, I think it likewise in fairness might have been pointed out to the jury that the ebb and flow of the water of the lake serves, too, as an automatic irrigating process which adds value, and favorably so, to the lands through the action of the water. I submit that as a fact that we all know that might have been balanced off.

The Court: Well, that is the point that I said in the other part of it, to which you have already taken exception. I said it had no value unless there was water.

Mr. Hicks: Well, I personally do not see any inconsistency in my position.

The Court: I don't see any inconsistency in my instruction. I think it balanced both sides of it.

Mr. Hicks: Maybe I misapprehended it. Your Honor, in commenting, said that their valuations were placed without taking into consideration the reservation, which, of course, was true, and said that had that reservation been taken into consideration the values should have been much larger. Now, if the record shows—I believe only one witness did place a value on a rental basis for a five-year period, a reasonable rental basis, and that valuation that he put on there was some nine hundred plus dollars. Now, the only evidence specifically on that phase of the case is the item of nine hundred dollars, and it occurred to me that the jury, under your Honor's instruction, when you said it would be much less, when the evidence is here that it is nine hundred and something, something under a thousand dollars, for five years——

The Court: Well, I didn't agree with the appraisers myself. I don't agree with them. I think a five-year reservation on a piece of property is of considerably more value than less than a tenth of the fee title. As a matter of fact, appraisers, normally speaking, appraise the full fee value as twenty years, and I have pointed out in some of my opin-

ions. In *In re Beeman* I pointed out the fact that the fee value is eaten up in twenty years, and, therefore, I do not agree with them, although I did not specifically comment to that effect, and in as much as your testimony was not entitled to admission at all I thought I was very lenient about commenting on it.

Mr. Hicks: May we have the exceptions?

The Court: Yes. Further matters? Court is in recess.

(A recess was thereupon had, and at 9:45 o'clock p. m. a verdict was returned by the jury and read in open court.)

The Court: Is this your verdict, ladies and gentlemen of the jury?

The Jury: Yes, sir.

The Court: The verdict will be received and filed and judgment entered thereon.

Ladies and gentlemen, the Court thanks you for the attention you have given this case and discharges you from [276] further consideration thereof. The Court also discharges you from further attendance on the court at this time until you are further notified. You are now excused.)

(The jury was thereupon excused.)

The Court: Court is now in adjournment until tomorrow morning at 9:00 o'clock.

(Whereupon, at 9:50 o'clock p.m., Thursday, September 25, 1947, court adjourned to 9:00 o'clock a.m., Friday, September 26, 1947.)

Saturday, September 27, 1947, further proceedings herein were had as follows:

The Court: The Court suggests that further consideration will be given to the case which was tried the other day, the last verdict of the jury, in the Hayes case, in the question of the validity of the Declaration of Taking.

Mr. Boylan: That will be taken up, I assume, in Portland?

The Court: The Court is reserving that, of its own motion, at the present time. [278]

Monday, October 20, 1947, at Portland, Oregon, proceedings herein in re motion to set aside verdict of the jury were had as follows:

Appearances:

Mr. Bert C. Boylan, Special Assistant to the United States Attorney, appearing for plaintiff;

Mr. Edwin D. Hicks, of attorneys for defendants Hayes.

(The motion was argued at length by respective counsel, following which the following occurred:)

The Court: Well, I have tried to arrange this with you gentlemen, but you bring it up on a strict legal basis, and if you leave it that way I am going to rule on a strict legal basis. You have got your heads set, apparently, on the thing. I know the answer all the way through this case and I am going to give it to you. Now, if there is going to be no yielding on either side of this case, then you will have to take it as it is. I take it that is what you want done.

Mr. Hicks: I am not sure I know what your Honor is driving at.

The Court: No, I know you don't know what answer I have in mind, but I assure you I have one. Now, I have talked to you both about this case and I told you what you had better do and you haven't done it, so if you want to put it on a strict legal basis now you are going to take a strict legal [279] result, if that is the way you want to submit it.

Mr. Hicks: I believe we have no alternative, your Honor, so far as I know.

The Court: Well, all right,—I take it the Government feels the same way, so here is the answer.

The verdict was, in the opinion of the Court, excessive. I think that the jury did not give proper value to the reservation. The reservation of five years without rental upon that land, in my opinion, is worth a great deal more than the Court believes the jury gave to it. As I view the jury's verdict, they took Howard's figure, which was on the basis of forty thousand dollars for the fee simple title, and appraised the reservation at four thousand, and I think that is an improper result, and I, in the instructions, very carefully cautioned them to give value to that reservation but they didn't do it, so I take it that they did not follow the instructions. It is true they did not have to, but they are supposed to pay more attention to what I say than what they did, and as a result of it the verdict can't stand.

There is another reason why the verdict can't stand. The Court was in error in not allowing the Government to show what the contract was. If the

jury had found that these people had agreed to the value that they did on that contract, I am quite sure that they would not have returned the verdict that they did. So that is an additional ground why this verdict can't stand. [280]

On the other hand, the contract itself was negotiated in a way which makes me believe that the Hayeses didn't know what was in the contract. The testimony of Hayes, given on the witness stand, indicated to me that he had very carefully worked out a reservation that he desired and he expected to get. That reservation was that he should have this land free for five years, at the end of that time that he should have an option to lease it at a price to be agreed upon under the rules and regulations laid down by the Secretary of the Interior, and that when that time had elapsed he had another option. Now, those options, in my opinion, are of great value, even with the reservation that the Secretary of the Interior could lay down rules upon which the value of the lease would be computed, or the value of the rental. Besides that, I don't think that they knew that they were comprising the damage claim they had against the Government. Now, that is the Government's own mistake. It was not upon the ground at all that it was entirely unethical from the standpoint of the lawyers, although it was entirely unethical to deal with those people in that way, and it certainly was unethical to write into the contract things that they did not agree to and stipulations entirely contrary to what their agreement was. I have no doubt that Mr. Hayes' testimony was cor-

rect and that that is what he stipulated for and that is what he [281] thought he was getting. If he had had a lawyer there, he would have known he wasn't getting it, and I do not palliate or defend for a single moment the conduct of the Government in entering into a contract under those circumstances. That is why I set it aside, and I still stand in that position.

Now, I think the agents of the Government, though, should not be bound by the Declaration of Taking that was entered into under those circumstances. I think they thought they were pretty cute all right and that they were going to consummate and obtain the fruits of their fraud. I have decided they can't do that,—in other words, they can't enforce the contract—but, on the other hand, I don't think the Government is bound by the Declaration of Taking that was entered, to which the contract was a condition precedent, and I don't think that the Government can be estopped by the filing of a Declaration of Taking under those circumstances,—that the Government would have a right to withdraw. True, the Government is not withdrawing, because they think they can enforce that contract. I don't think any court in the country would allow them to enforce that contract. Therefore, I don't think they would be bound by the Declaration of Taking. As a result of that, I strike the Declaration of Taking from the files and dismiss the cause.

Mr. Hicks: Could I make one observation, your Honor? [282]

The Court: Yes.

Mr. Hicks: The Court will recall that even after your Honor had held that the contract was not valid we indicated, I believe on the record, our consent to the government that if it wanted to strike the Declaration of Taking and put the Hayeses in the same status that the other people were in after those other cases had been tried out there, so the Hayeses could keep the land and the Government could keep its money, that that was agreeable with us, and counsel informed me that he had communicated with the Attorney-General and even then the Attorney-General would not authorize him to strike the Declaration of Taking, and so no motion was made by him, although it was invited by the Court, to move to strike that Declaration of Taking,—he refused to do it even after your Honor set aside the contract; they chose to go to the jury and have them set a valuation on the land and let the Declaration of Taking stand. That is the history of it, and Mr. Boylan will confirm me on that. That is the exact status of it.

The Court: Yes.

Mr. Hicks: And, with regard to the other point about the jury not being permitted to know about the contract and all, your Honor will recall that we urged upon the Court the proposition that the jury should have that whole question on the contract and that we should be permitted to show the circumstances under which it was entered into, and they were [283] going to show the contract as such, but it was on the application of counsel that they urged upon the Court that that question was one for the

Court and not for the jury, so if there was error there the gentlemen certainly invited it. Now, that is the true history of it.

The Court: Yes, but you weren't so lily-white either. I asked you on the morning that this case was tried if you would not agree to that proposition, so they could submit it to Washington. You told me you would not.

Mr. Hicks: You mean about striking the Declaration?

The Court: Yes.

Mr. Hicks: Now, I might be in error, your Honor, that even after you set the contract aside Mr. Boylan did communicate with Washington to find out whether the Declaration might be stricken, in order that the Hayeses might be put in the same position as Rose Otley and Henry Otley and the others there, and, if my memory serves me, we were willing to do that very thing.

The Court: Well, you didn't tell me you were willing. I asked you that question that morning and you said you thought you had some doubts about it.

Mr. Hicks: Yes, I remember that.

The Court: My memory isn't so wrong about that.

Mr. Hicks: I might be wrong about that. Now, I did consult with them and I told Mr. Boylan—I might be wrong [284] about this—to find out whether they would consent to have the Declaration withdrawn, because our people didn't want the Government to have the land, they wanted to be put in the position of the other people.

The Court: All right, if you are satisfied.

Mr. Hicks: Now, we have gone ahead and had a jury trial, and the fact is, I think, your Honor, that the morning after the Court held the contract to be invalid Mr. Boylan talked to the Attorney-General at that time to find out whether they would permit him to move for a dismissal on the Declaration of Taking and they wouldn't give him that authority. I thought the trial would have been avoided if he could have gotten permission from the Department of Justice to dismiss that, and I thought we had kept your Honor fully advised of our position in that regard. Mr. Boylan doesn't gainsay a thing I have said.

The Court: Oh, no. I have heard your argument on the matter. I have ruled now. I told you what would happen if you were going to take a chance on it. My memory is good as to what conversation took place, and so I don't think anybody is in a position to question the ruling. You are perfectly at liberty to appeal it, on both sides. I am perfectly satisfied. If you can get anybody to accept a different view, that is fine with me.

Mr. Boylan: If the Court please, might we have an exception [285] to that portion of the Court's ruling wherein it rules that the Declaration of Taking be stricken?

The Court: Sure, you can have an exception to all of it, on both sides.

Mr. Hicks: Yes, we may have exceptions throughout to your Honor's adverse rulings with

respect to the verdict and the judgment and its validity, and so on.

The Court: I think I must be right, now, because I am in the middle of the road. [286]

[Title of District Court and Cause.]

Certificate

I, Cloyd D. Rauch, a Court Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that I reported in shorthand the testimony and proceedings had at the trial of the above cause and at certain subsequent dates, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages 1 to 286, both inclusive, constitutes a full, true and accurate transcript of said testimony and proceedings, so taken by me in shorthand as aforesaid, and of the whole thereof.

Dated this 11th day of March, A.D. 1948.

CLOYD D. RAUCH,
Court Reporter.

[Endorsed]: No. 11900. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife; Adelbert M. Hayes, and Harney County, a Municipal corporation and political subdivision of the State of Oregon, Appellees, and Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, husband and wife; and Adelbert M. Hayes, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Oregon.

Filed April 16, 1948.

/s/ PAUL P. OBRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11900

UNITED STATES OF AMERICA

Appellant,

vs.

MARCELLUS B. HAYES and Wife, MARY I.
HAYES, and ADELBERT M. HAYES,
Appellees.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD FOR PRINTING

The United States of America, appellant in the above-entitled proceeding, adopts and will urge as its points on appeal the statement of points appearing in the transcript of record on file herein; and

Appellant designates, for printing, the entire certified transcript of record on file herein.

Dated at Washington, D. C., this.....day of July, 1948.

A. DeVITT VANECH,
Assistant Attorney General.

[Endorsed]: Filed July 6, 1948.

[Title of Circuit of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY CROSS-APPELLANTS

Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, and Adelbert M. Hayes, defendants and cross-appellants herein, and each of them, hereby adopt the Statement of Points upon which the said defendants and cross-appellants intend to rely on appeal that was filed in the District Court of the United States for the District of Oregon as the points upon which they intend to rely for appeal in the Circuit Court of Appeals of the United States for the Ninth Circuit.

Dated this 28th day of June, 1948.

HICKS, DAVIS & TONGUE,
J. W. McCULLOCH,
Attorneys for Cross-
Appellants.

Due and legal service of the within Statement of Points to be Relied Upon by Cross-Appellants by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 7th day of July, 1948.

LINUS M. FULLER,
Of Attorneys for Plaintiff.

[Endorsed]: Filed July 8, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY CROSS-APPELLANTS OF
CONTENTS OF RECORD ON APPEAL

Come now Marcellus B. Hayes and Mary I. Hayes, also known as Bell Hayes, and Adelbert M. Hayes, as defendants and cross-appellants herein, pursuant to Rule 75, Federal Rules of Civil Procedure, and designate the same portions of the record to be contained in the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause as heretofore designated by the United States of America, the appellant herein.

Dated this 28th day of June, 1948.

HICKS, DAVIS & TONGUE,
J. W. McCULLOCH,

Attorneys for Defendants and
Cross-Appellants.

Due and legal service of the within Designation by Cross-Appellants of Contents of Record on Appeal by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 7th day of July, 1948.

LINUS M. FULLER,
Of Attorneys for Plaintiff.

[Endorsed]: Filed July 8, 1948.

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	2
Questions presented.....	2
Statement.....	2
Specifications of error.....	7
Argument:	
I. The district court lacked power to strike the declaration of taking.....	7
II. The Government was entitled to have judgment entered for the amount stipulated in its contract with the defendants.....	8
Conclusion.....	12

CITATIONS

Cases:	
<i>Albrecht v. United States</i> , 329 U. S. 599.....	9
<i>Danforth v. United States</i> , 308 U. S. 271.....	9
<i>Muschany v. United States</i> , 324 U. S. 49.....	9
<i>Oakland v. United States</i> , 124 F. 2d 959, certiorari denied, 316 U. S. 679.....	7
<i>Scott v. United States</i> , 161 F. 2d 1009.....	9
<i>United States v. Carey</i> , 143 F. 2d 445.....	8
<i>United States v. Certain Land in City of St. Louis, Etc.</i> , 58 F. Supp. 305.....	9
<i>United States v. Greer Drainage District</i> , 121 F. 2d 675.....	9
<i>United States v. 150.29 Acres of Land, Etc., in Milwaukee Co., Wis.</i> , 135 F. 2d 878.....	8
<i>United States v. Sunset Cemetery Co.</i> , 132 F. 2d 163.....	8
<i>United States v. 3.25 Acres of Land, Etc.</i> , 53 F. Supp. 884.....	9
<i>Wachovia Bank & Trust Company v. United States</i> , 98 F. 2d 609.....	9

(I)

In the United States Court of Appeals for the Ninth Circuit

No. 11900

UNITED STATES OF AMERICA, APPELLANT

v.

MARCELLUS B. HAYES AND MARY I. HAYES, ALSO
KNOWN AS BELL HAYES, HUSBAND AND WIFE; ADEL-
BERT M. HAYES, AND HARNEY COUNTY, A MUNICIPAL
CORPORATION AND POLITICAL SUBDIVISION OF THE
STATE OF OREGON, APPELLEES

and

MARCELLUS B. HAYES AND MARY I. HAYES, ALSO
KNOWN AS BELL HAYES, HUSBAND AND WIFE; AND
ADELBERT M. HAYES, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON*

BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The district court did not write an opinion. Its
remarks in making the rulings complained of are
found at R. 150-155, 199-200 and R. 341-348.

JURISDICTION

This is an appeal from an order entered October 23, 1947 (R. 60-61). On January 16, 1948, the United States filed notice of appeal (R. 61-62).

The jurisdiction of the district court was invoked under the Migratory Bird Conservation Act, approved February 18, 1929, 45 Stat. 1222, as amended, 16 U. S. C. sec. 715, and the Act of August 1, 1888, 25 Stat. 357, as amended 40 U. S. C. sec. 257 (R. 2-7). The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended 28 U. S. C. sec. 225 (a).

QUESTIONS PRESENTED

1. Whether a district court can strike a declaration of taking and dismiss the condemnation proceeding in which it was filed.

2. Whether, when owners of land against which a condemnation proceeding is pending agree with the Government upon the consideration for the transfer of title, the court may refuse to enforce the contract because it was executed without the advice and assistance of the owners' counsel.

STATEMENT

On April 22, 1946, the United States instituted proceedings to condemn 1,101.68 acres of land owned by Mary I. (Bell) Hayes and her husband, Marcellus B. Hayes, in Harney County, Oregon, for the purpose of providing an addition to the Malheur National Wildlife Refuge of Oregon (R. 2-7). On August 13

following, an amended complaint more particularly describing the land was filed (R. 9-14). On October 2, 1946, an answer was filed alleging that the property sought to be condemned had a value of \$55,084 (R. 18-22).

On October 9, 1946, the landowners and their son Adelbert, in consideration of the sum of \$16,000, agreed to the acquisition by the United States by judicial proceedings of the lands described in the amended complaint "subject to the reservation of the right to use in livestock ranching operations * * * the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five (5) years from the date hereof in accordance with rules and regulations of the Secretary of the Interior." The agreement was executed by the United States on December 16, 1946 (R. 46-52, 92).

On February 11, 1947, pursuant to the Act of February 26, 1931, 46 Stat. 1421, as amended, 40 U. S. C. secs. 258a-258f, a declaration of taking covering the interest described in the agreement was filed, and the sum of \$16,000, estimated to be just compensation, was deposited in the registry of the court (R. 23-26). A second amended complaint conforming to the declaration of taking was filed on February 13 (R. 27-33) and on February 26 judgment was entered on the declaration and immediate possession granted (R. 36-39).

On September 24, 1947, the district court heard testimony in respect of the circumstances of the de-

fendants' execution of the acquisition agreement (R. 90-150) which may be summarized as follows:

Mr. and Mrs. Hayes had owned and occupied the land since 1910 (R. 99, 107, 117). They were old (R. 94) but perfectly competent to engage in business affairs. They had been approached by employees of the Fish and Wildlife Service of the Department of the Interior, the acquiring agency, after the original condemnation complaint was filed (R. 97, 109-110, 111, 116). The negotiations lasted over a period of weeks (R. 99). Before the Hayeses agreed, they consulted their attorneys who advised them not to accept on the grounds that the price was too low and probably the offer was not in good faith (R. 100-102). They did not follow the advice.

They decided to sell because they thought the Government was going to condemn anyhow (R. 97, 103, 110-111, 113, 119, 122, 129). However, as the court pointed out (R. 139) no Government agent is authorized to represent that, if an owner of land will not settle, the Government will condemn. Mrs. Hayes was unaware that the Government need not take the property if it thought the award too high and testified that, if she had known this, she would have refused to sell (R. 131-132). Though Mr. Hayes had read the agreement, he testified he did not know it settled a claim against the Government under the Tucker Act worth about \$700 (R. 118, 123; see also R. 140-141) and further that he was of the impression that, although the Government would pay \$16,000 and give him a free five-year occupancy, he was also to have thereafter a perpetual option to rent (R. 120). The

Hayeses had not drawn the \$16,000 deposited with the declaration (R. 107) and about a month before the trial had become dissatisfied with the bargain (R. 106, 107, 111–112, 129).

At the conclusion of the testimony, the trial judge announced his belief that “these people have unquestionably changed their minds” after being “perfectly well satisfied”¹ (R. 150; see also R. 115). Nonetheless, he held the contract was inadmissible (R. 153). At the time, he assigned two reasons: The first was that, in view of the Government’s past representations to landowners and to the court, defendants were entitled to believe that the “Government was going to take this land in spite of everything” (R. 150–151). The second was that those who acted for the Government did not consult or call in defendants’ attorneys before securing defendants’ execution of the agreement (R. 151–152). A third reason—advanced in the course of the subsequent proceedings—was that Mr. Hayes believed that the agreement conferred an option to rent in perpetuity (R. 199–200).

Since the court refused to give effect to the contract, it was necessary to try the issue of valuation to the jury (R. 161–323). Witnesses for the defendants

¹ The judge said (R. 150) :

As far as the Court is concerned, I think these people have unquestionably changed their minds, notwithstanding their testimony. I think *they were perfectly well satisfied and would have taken this money and accepted this contract* at any time up until the first verdict came in in these cases, then they thought that there was a chance to capitalize on them, and that is their status. [Italics supplied.]

appraised the properties at \$40,245 (R. 242) and \$23,885.40 (R. 259). However, neither took account of the right reserved to use part of the land free of charge for five years (R. 261) which would reduce the market value (R. 262). Witnesses for the Government, having in mind the value of the reserved right, valued the properties at \$10,800 (R. 291) and \$9,922 (R. 311). The jury returned a verdict for \$36,500 (R. 55-56) upon which judgment was entered (R. 56-59).

The Government moved to set aside the judgment and verdict and for a new trial (R. 59). After argument (R. 341), the court stated that the verdict could not stand because it was excessive (R. 342) and because the court should have allowed the contract to go to the jury in order for it to know that defendants had agreed to the value of \$16,000 (R. 342-343).

However, the court reiterated its refusal to give effect to the contract on the ground that Hayes did not know that it did not contain a perpetual option to rent nor that it released another claim against the Government—mistakes he would not have made if defendants' lawyer had been present (R. 343-344).

It concluded that the Government should not be bound by a declaration of taking based upon the contract. "True," the court added, "the Government is not withdrawing because they think they can enforce that contract. I don't think any court in the country would allow them to enforce that contract. Therefore, I don't think they would be bound by the Declaration of Taking. As a result of that, I strike the

Declaration of Taking from the files and dismiss the cause'' (R. 344).

The order appealed from was then made (R. 60-61). It struck the declaration of taking from the files, vacated the judgment on the declaration and the order granting immediate possession and dismissed the cause.

SPECIFICATIONS OF ERROR

The statement of points relied on by the United States on its appeal (R. 69-70) may be summarized as follows:

The district court erred:

1. In striking the declaration of taking, vacating the judgment thereon and order granting immediate possession, and dismissing the proceedings.
2. In refusing to enforce the contract between the landowners and the Government.
3. In holding that the contract between the parties was negotiated by the agents of the Government in an unethical manner.
4. In holding that the landowners did not know what was in the contract.

ARGUMENT

I

The district court lacked power to strike the declaration of taking

By filing the declaration of taking and depositing the sum estimated to be just compensation, the United States became vested with the property here involved. *City of Oakland v. United States*, 124 F. 2d 959, 963

(C. C. A. 9, 1942), certiorari denied 316 U. S. 679; *United States v. 150.29 Acres of Land, Etc. in Milwaukee Co., Wis.*, 135 F. 2d 878, 881 (C. C. A. 7, 1943). The United States was powerless to withdraw the declaration. *United States v. Sunset Cemetery Co.*, 132 F. 2d 163, 164 (C. C. A. 7, 1942). And, as this Court has held, the district court was equally unable to dismiss it. *United States v. Carey*, 143 F. 2d 445, 450 (C. C. A. 9, 1944). There is no warrant for the view of the lower court that it is relieved of this disability if (as it believed was the case here) the United States filed the declaration in reliance upon a contract fixing compensation which the court will not enforce. The fact is that by complying with the terms of the statute the United States acquired the property. It is immaterial whether or not it acted wisely or with knowledge of all the facts. In dismissing the declaration—and purporting to divest the title so acquired—the court below exceeded its power.

II

The Government was entitled to have judgment entered for the amount stipulated in its contract with the defendants

In the absence of a binding agreement, compensation for property taken for a public use must be ascertained judicially. But the Fifth Amendment does not prevent the Government and the owner of property from agreeing upon the amount to be paid for it. The parties are not compelled to go to court to determine a question which they can settle for themselves. Therefore, where a valid agreement has been entered

into fixing the purchase price of property, it is the duty of the court in a condemnation proceeding to enter judgment for that sum. *Albrecht v. United States*, 329 U. S. 599, 603 (1947); *Muschany v. United States*, 324 U. S. 49 (1945); *Danforth v. United States*, 308 U. S. 271, 282-283 (1939); *Scott v. United States*, 161 F. 2d 1009, 1013 (C. C. A. 6, 1947); *United States v. Greer Drainage District*, 121 F. 2d 675, 676 (C. C. A. 5, 1941); *Wachovia Bank & Trust Company v. United States*, 98 F. 2d 609, 612 (C. C. A. 4, 1938); *United States v. Certain Land in City of St. Louis, Etc.*, 58 F. Supp. 305, 307 (E. D. Mo., 1944); *United States v. 3.25 Acres of Land, Etc.*, 53 F. Supp. 884, 885-886 (W. D. N. Y., 1943).

In this case, the contract is unexceptionable. The landowners were competent to contract and well aware of the value of the property. The agents of the Government dealt fairly with them in the negotiations. It is true the trial court described the agents' conduct as "entirely unethical" (R. 343) and "pretty cute" (R. 344) and adverted to their "fraud" (R. 344). These characterizations are quite undeserved. The remarks of the court will be searched in vain for a single specification of wrongdoing. So also will be the record.

Moreover, the court stated that defendants had been "perfectly well satisfied" with the resulting contract and that "these people have unquestionably changed their minds" (R. 150). The court did not thereby mean that at first defendants were in a state of blissful ignorance and changed their minds when they were apprised of the truth. For it subsequently ruled

that the verdict could not stand because the contract had not been submitted to the jury. "If," the judge said, "the jury had found that these people had agreed to the value that they did on that contract, I am quite sure that they would not have returned the verdict that they did" (R. 342-343). This can only mean that the contract was executed fairly.

Nonetheless, the court refused to give effect to the contract. The basis of its refusal seems to have been that Mr. Hayes expected to get a perpetual option to rent the property (R. 343) and that: "If he had had a lawyer there, he would have known he wasn't getting it" (R. 344). Clearly, this consideration does not vitiate the contract.

While the agents—laymen like the landowners—dealt directly with the Hayeses, the latter were free to consult their lawyers at any and all stages of the negotiations. There is, of course, no testimony that the Government agents sought to influence them from doing so. Indeed, they had asked their lawyers' opinion as to the adequacy of the consideration and had ignored the consequent advice not to accept, a circumstance, incidentally, which might explain their failure to ask the lawyers for a construction of the contract thereafter drafted. In any event, defendants were quite able to decide for themselves whether it was worthwhile again to approach the lawyers.

One may not say with certainty how far—in the view of the trial court—the Government agents were required to go in governing defendants' conduct. (Perhaps it was the court's thought that the agents themselves were under a duty to carry the proposed

contract to the lawyers.) Be that as it may, it is submitted that the trial court had an erroneous notion of the obligation of Government representatives in dealing with owners of property which the Government wishes to acquire. These owners—even when condemnation proceedings are instituted—are not rendered *pro tempore* incompetent. They do not become wards of the court. They are still free to make contracts. And if their contracts are free from fraud or other invalidating defects, they are binding.²

This contract is not tainted. Therefore, it would be gravely unjust to refuse to enforce it merely because the Government did not insist that the other party seek legal advice which in the opinion of the trial court would have been of assistance to him.

It is submitted accordingly that the court below erred in failing to hold that the price stipulated in the contract was the amount which should have been awarded defendants for the land acquired by the declaration of taking.

² In ruling that the contract was inadmissible in evidence, the court referred (R. 150–151) to defendants' apparent impression that the "Government was going to take this land in spite of everything," thus implying defendants would not have sold if aware of the possibility that the Government might reject the award and so leave them in possession of the land. Obviously, this circumstance does not tend to invalidate the contract. In the first place, the impression was correct: thereafter a declaration of taking was filed and defendants were divested of the land. Secondly, whether or not the Government accepted the award, the defendants inevitably would have incurred certain legal expenses if they did not sell. The prospect of avoiding these expenses probably influenced them as greatly as the belief that they were to be divested of title. (See e. g. R. 103.)

CONCLUSION

For the foregoing reasons, it is submitted that the order of the district court should be reversed and the cause remanded with directions to reinstate the dismissed proceedings and to enter judgment for defendants for the amount stipulated in the contract.

Respectfully.

A. DEVITT VANECH,
Assistant Attorney General.

HENRY L. HESS,
*United States Attorney,
Portland, Oregon.*

JOHN F. COTTER,
ELIZABETH DUDLEY,
*Attorneys, Department of Justice,
Washington, D. C.*

SEPTEMBER 1948.

No. 11900

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,*
vs.
MARCELLUS B. HAYES and MARY I. HAYES, also
known as BELL HAYES, husband and wife; ADEL-
BERT M. HAYES, and HARNEY COUNTY, a mu-
nicipal corporation and political subdivision of the
State of Oregon, *Appellees,*
and
MARCELLUS B. HAYES and MARY I. HAYES, also
known as BELL HAYES, husband and wife; and
ADELBERT M. HAYES, *Cross-Appellants,*
vs.
UNITED STATES OF AMERICA, *Cross-Appellee.*

Upon Appeal from the District Court of the United
States for the District of Oregon

BRIEF FOR APPELLEES AND
CROSS-APPELLANTS

EDWIN D. HICKS,
J. W. McCULLOCH,
THOMAS H. TONGUE, III
HICKS, DAVIS & TONGUE,
Attorneys for Appellees and Cross-Appellants.

A. DEVITT VANECH,
Assistant Attorney General.

HENRY L. HESS,
United States Attorney,
Portland, Oregon

JOHN F. COTTER,
ELIZABETH DUDLEY,
Attorneys, Department of Justice,
Washington, D. C.
Attorneys for Appellant and Cross-Appellee.

FILED

NOV 15 1948

PAUL P. O'BRIEN,

CLERK

I.

SUBJECT INDEX

	Page
JURISDICTION	2
STATEMENT OF THE CASE.....	2
1. The Pleadings	2
2. Negotiation of Contract for Sale of Lands and Settlement of Case.....	3
3. Description of Lands and Estimates of their Value	8
4. Instructions to the Jury, Verdict and Decision of the Trial Judge.....	10
SPECIFICATION OF ERRORS.....	12
1. On Appeal by Government.....	12
2. On Cross-Appeal	13
SUMMARY OF ARGUMENT.....	15
ARGUMENT ON APPEAL BY GOVERNMENT	17
I. WHETHER COURT ERRED IN STRIK- ING DECLARATION OF TAKING.....	17
II. THE COURT DID NOT ERR IN REFUS- ING TO ENFORCE THE AGREEMENT TO SELL THE LAND FOR A SPECIFIED SUM	19
A. Contract Invalidated by Conduct and Representations of Government Agents..	20
B. Contract Invalidated by Failure to set forth Understanding by Defendants.....	25
C. Contract also Invalidated by Concealment of Facts by Government Agents.....	28
D. Government failed to maintain Burden of Proof that Dealings were Fair, Open, Voluntary and Well Understood.....	32

II.

SUBJECT INDEX (Continued)

	Page
ARGUMENT ON CROSS-APPEAL.....	34
I. IT WAS ERROR TO HOLD THAT CONTRACT SHOULD HAVE BEEN SUBMITTED AS MEASURE OF DAMAGES.....	34
A. Contract set aside for Mistake, Misrepresentations, Concealment and Overreaching could not be used as Measure of Damages..	35
B. Contract did not reflect Fair Market Price.	38
C. Contract was no more than Offer of Compromise	39
D. Government estopped from complaining of Error	41
II. IT WAS ERROR TO SET ASIDE VERDICT AS EXCESSIVE AND TO HOLD THAT JURY DID NOT GIVE PROPER VALUE TO RESERVATION.....	42
A. Verdicts not to be set aside as Excessive unless so clearly Excessive as to shock Conscience of Court or unless Manifest that Jury adopted false Theory of Law.....	43
B. Trial Judge held only that Jury did not give proper Value to Reservation, and there is no Evidence to support such Finding	46
C. Verdict should be cured by Remittitur if Excessive	51
CONCLUSION	53

III.

TABLE OF CASES

	Page
Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 74, 9 S. Ct. 458.....	43
Boyle v. Ward, 39 F. Sup. 545.....	44
Burris v. American Chicle Co., 33 F. Sup. 104, 108..	43
Carberry v. Acme Transit Co., 203 Fed. 780.....	44
Clarksburg Trust Co. v. Commercial Casualty Ins. Co., 40 F. (2d) 626, 630.....	27
Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 560, 30 S. Ct. 581.....	46
Davis v. Commissioners of Sewerage, 13 F. Sup. 672	30
Garrow v. United States, 131 F. (2d) 724, 726.....	39
In re Construction Materials Corp., 18 F. Sup. 509..	24
Kaufman v. Atlantic Greyhound Corp., 41 F. Sup. 252.....	44
Leathem Smith-Putnam Nav. Co. v. National U. F. Ins. Co., 96 F. (2d) 923.....	31
Malone v. Montgomery Ward & Co., 38 F. Sup. 369.	44
Order of United Commercial Travelers v. McAdam (C.C.A. 8th), 125 Fed. 358, 369.....	22
Popovitch v. Kasperlik, 70 F. Sup. 376.....	33
Smith v. Pittsburg & W. Ry. Co., 90 Fed. 783, 788..	43
John T. Stanley Co. v. Lagomarsino, 53 F. (2d) 112.	27
Staten Island Hygeia Ice & Cold Storage Co. v. United States (C.C.A. 2d), 85 F. (2d) 68.....	21
United States v. Certain Parcels of Land, 149 F. (2d) 81, 83.....	51
United States v. Certain Lands in Jackson County, 48 F. Sup. 591.....	45

IV.

TABLE OF CASES (Continued)

	Page
United States v. City of New York, 165 F. (2d) 526, 531	45
United States v. Dillman, 146 F. (2d) 572.....	46
United States v. 2.4 Acres of Land, 138 F. (2d) 295.	45
United States v. 133.1 Acres of Land, 42 F. Sup. 582.	45
United States v. 1,192.9 Acres of Land, 55 F. Sup. 995	45
Winget v. Rockwood, 67 F. (2d) 326.....	30
Zarek v. Fredericks, 49 F. Sup. 64.....	44

STATUTES

16 U.S.C. Sec. 715	2
28 U.S.C. Sec. 225 (a)	2
40 U.S.C. Sec. 257	2
40 U.S.C.A. Sec. 258 (a)	21

OTHER AUTHORITIES

19 Am. Jur. p. 75.....	27
12 Cyclopedia of Federal Procedure (2d Ed.), Sec. 6197	13
Pomeroy's Equity Jurisprudence (4th Ed.), Sec. 845	27
Pomeroy's Equity Jurisprudence, Sec. 849.....	22
Williston on Contracts, Secs. 1544 and 1500.....	24, 27

No. 11900

In the United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	<i>Appellant,</i>
vs.	
MARCELLUS B. HAYES and MARY I. HAYES, also known as BELL HAYES, husband and wife; ADEL- BERT M. HAYES, and HARNEY COUNTY, a mu- nicipal corporation and political subdivision of the State of Oregon,	<i>Appellees,</i>
and	
MARCELLUS B. HAYES and MARY I. HAYES, also known as BELL HAYES, husband and wife; and ADELBERT M. HAYES,	<i>Cross-Appellants,</i>
vs.	
UNITED STATES OF AMERICA,	<i>Cross-Appellee.</i>

Upon Appeal from the District Court of the United
States for the District of Oregon

BRIEF FOR APPELLEES AND CROSS-APPELLANTS

In accordance with the stipulation of the parties filed herein, the following brief is submitted as a combined brief on behalf of Marcellus B. Hayes, Mary I. Hayes and Adelbert M. Hayes, as appellees, in answer to the opening brief of the appellants herein, and also as their opening brief as cross-appellants on cross-appeal.

JURISDICTION

As stated in the complaints filed herein (R. 2, 9 and 27), this is a land condemnation proceeding by the United States pursuant to the Act of August 1, 1888 (25 Stat. 357, 40 U.S.C. Sec. 257), and the Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222, 16 U.S.C. Sec. 715). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U.S.C. Sec. 225 (a).

STATEMENT OF THE CASE

1. *The Pleadings.*

As stated in appellant's brief (p. 2), the condemnation proceedings in question were instituted on April 22, 1946 (R. 2-7), and an amended complaint was filed on August 13, 1946 (R. 9-14). At the same time there was pending an action by these same landowners against the United States under the Tucker Act for damages resulting from the use and occupation by the United States of a portion of the same lands (R. 105). On October 2, 1946, an answer was filed in this case alleging that the land involved had a value of \$55,084.00 (R. 18-22). On February 11, 1947, a declaration of taking was filed alleging that \$16,000.00 was the reasonable value of the interests to be condemned (R. 23-26). On February 13, 1947, a second amended complaint was filed, asking for condemnation of the fee simple title, subject

to a five year reservation of a portion of the lands (R. 27-33). On February 26, 1947 a judgment was entered on the declaration of taking (R. 36-39). Apparently the previous answer was regarded as an answer to the second amended complaint, as a reply was then filed by the Government on September 11, 1947, and as an affirmative reply alleged that defendants had entered into an agreement to sell the lands, subject to the reservation, for \$16,000.00, and were, therefore, estopped from demanding any further sum (R. 41-44). Defendants filed a motion to strike this affirmative reply (R. 53-54), but the motion was never ruled upon.

2. *Negotiation of Contract for Sale of Lands and Settlement of Case.*

On October 9, 1946, without instructions or authorization from United States Attorneys in charge of this litigation (R. 134, 148), and despite protests from attorneys for defendants complaining of such conduct in other cases (R. 133), and with full knowledge that defendants were then represented by counsel (R. 141, 142, 146), two representatives of the Fish and Wildlife Service of the United States Department of Interior contacted Mr. and Mrs. Hayes and their son, in the absence of their attorneys, and persuaded them to sign an agreement under which they agreed to accept \$16,000.00 for their lands, subject to a five year reser-

vation in their favor for the use of a portion of the lands for livestock operations (R. 46-53). It also provided that the vendors gave up all claims of compensation for damages under the Tucker Act (R. 51).

At that time Mr. Hayes was eighty-two years of age and his wife was seventy-two years of age (R. 94). They had written to one of their attorneys concerning a verbal offer of compromise by the Government and had been advised by him against its acceptance (Def. Ex. 3, R. 100). The Government agent was told by them of this advice but he replied that "he took it for granted that it would be all right with Mr. McCulloch for us to sign it" (R. 102); that "anything to keep it out of court would be better than going to court" (R. 103, 116); that the Government was going to get the land even if they did contest the case (R. 116). The Government agents then called their head office in Chicago by telephone to expedite authorization of a contract on those terms (R. 142), had Mr. and Mrs. Hayes sign it the next day in their own home, not even in the presence of a notary public, and then took the contract and their son, Adelbert, to a notary public in town to have it notarized (R. 145).

Mr. and Mrs. Hayes testified that they did not want to sell the land (R. 97), but that they thought the Government would take it anyway (R. 110, 115) and that it

would therefore be best to compromise the case rather than to incur the expense and delay of litigation (R. 111). They also testified that they did not know and were not told by Government agents that if the case went to trial and the verdict of the jury was too high to please the Government, it might then decline to take the land and leave it with the previous owner, as later happened in condemnation proceedings for other Malheur Lake lands, and that if they had known this they would have refused to enter into the proposed agreement, since they did not want to sell their lands (R. 131).

In addition, Mr. and Mrs. Hayes testified that they then had a case pending against the Government for damages for the use and occupation by the Government of a portion of their lands (R. 105, 118); that they didn't realize and were not told that the proposed agreement included a settlement of this case (R. 104, 105, 118), and that the reference in the contract to the Tucker Act meant nothing to them, as they didn't know and were not told what the Tucker Act was (R. 105). They also testified that it was their understanding, from previous discussions with Government agents, that the contract would give them an option to lease a portion of the lands back from the Government for as long as they wanted it (R. 119, 120), a provision not included in the written form of agreement (R. 46-53).

Finally, Mr. and Mrs. Hayes testified that the agreed figure of \$16,000.00 did not represent an agreement as to the actual value of their lands, but was no more than a figure far below the actual value of the land, agreed upon solely for the purpose of compromise and avoiding further litigation (R. 97, 103, 111, 114, 115, 129); and that this figure was acceptable even on this basis solely because they needed funds badly and were told that payment would be forthcoming within two months (R. 96, 114, 117), a promise which did not materialize (R. 97, 117).

The Government agents admitted telling the Hayes that it was the intention of the Government to take their lands (R. 137), claimed that they told the Hayes that the settlement would "include the claims under the Tucker Act" (R. 137, 140-1), but of the actual conversations could remember only some discussion about the five year reservation (R. 149). They also admitted that the figure of \$16,000.00 was arrived at solely from the standpoint "Can we compromise our difficulties and settle the entire situation on the lake" (R. 137; see also R. 141), and that it was often their practice to attempt settlement of condemnation cases directly with landowners and without their attorneys, even though litigation had been instituted (R. 142). They also admitted that they knew that the contract itself was not submitted for

approval to attorneys for the Hayes and took no steps to do so themselves, although their office was within a mile from these attorneys' office (R. 149, 150).

At the trial of this case, attorneys for Hayes requested that the entire story of the circumstances under which the contract was negotiated be submitted to the jury (R. 90, 345). Instead, this phase of the case was tried before the Court, sitting without a jury (R. 89). The Court then held that although the Hayes had apparently changed their minds (R. 150) the contract should be set aside upon the ground that it was represented that the Government was going to take the land in spite of everything; that the Hayes relied and had a right to rely on this representation and that it was not carried out (R. 151). The Court also set aside the contract upon the ground that it was negotiated in an "entirely and absolutely unethical" manner by going "behind the backs of attorneys" representing the Hayes (R. 151). In a later oral opinion the Court also held that the Hayes didn't know that they were compromising their damage claim under the Tucker Act and were under the impression that at the end of the five year reservation they would have an option to lease the land for an additional term (R. 343).

The Court then set out to restore the status quo, on one hand, by setting aside the contract, and, on the other

hand, by offering to set aside the declaration of taking filed in reliance on the contract, on motion of the Government (R. 153). But the Government declined to make such a motion (R. 345), although the Hayes and their attorneys had, off the record and without advising the Court, agreed that this might be done, in order to restore the lands to the former owners (R. 108, 345-7).

3. *Description of Lands and Estimates of their Value.*

The testimony concerning the value of the Hayes farm was, of course, submitted to the jury (R. 161). The defendants' evidence on the question of value showed that this farm consisted of 1101.68 acres of land, of which 928 acres were in the lake-bed of Malheur Lake and 174 acres immediately adjacent (R. 315). That portion of the lake-bed has been dry since 1931 (R. 225), but, due to the moisture in the soil and its richness, is particularly valuable for grazing land for cattle and for growth of hay and grain (R. 173-4, 202). The Hayes grazed about 500 cattle on these lands (R. 171). They also planted oats and barley which produced from 60 to 100 bushels of oats per acre from portions of these lands (R. 177), although during some years the water did not recede in time to plant grain (R. 214). All of the 928 acres of lake-bed lands were extremely rich (R. 221) and were suitable for either growing grain (R. 179, 225-8) or hay (R. 180, 223, 229). The average yield of hay

was between one and one-half tons per acre (R. 204). It was also an excellent range for cattle, which could graze throughout the winter without hay (R. 182). The lake-bed lands were also valuable because of the presence of thousands of ducks and geese and also for the trapping of muskrats (R. 184-5). The lands adjoining the lake-bed were also rich (R. 229) and were productive for hay and grain, although there was a dry knoll of from 70 to 80 acres of greasewood (R. 190).

Defendants called two expert witnesses to testify as to the value of these lands. One, Mr. Howard, an engineer in charge of appraisal of all agricultural lands in nearby Klamath County for the Oregon State Tax Commission and a member of the Appraisal Board for the U. S. Reclamation Service (R. 238), appraised these lands at a valuation of \$40,245.00 (R. 242). The other, Mr. Cozad, was called as a stockman and appraised the lands, solely "as a stock raising deal", at a valuation of \$23,885.40 (R. 259).

The Government, on the other hand, called one of the agents employed directly by the U. S. Fish and Wildlife Service, who negotiated the settlement contract and who placed a value of \$10,800.00 on these lands (R. 291, cf. R. 136-7). This included a valuation of \$15.00 per acre on some hay lands (R. 299) and \$10.00 per acre on some of the grain lands (R. 301). The other appraiser called

by the Government, a real estate man from Portland, who also loaned money and sold insurance and who had been engaged for the previous two or three months by the Fish and Wildlife Service to devote most of his time to appraisal work, placed a value of \$9,922.00 on the lands (R. 306,311).

The appraisals by defendants' witnesses were made on the basis of the value of the fee simple title of the lands in question, with nothing deducted for the five year reservation for a portion of the lands (R. 242, 261). The Government witnesses, however, considered the value of the reservation in their estimates (R. 291, 311). One of the Government appraisers testified that the value of this reservation was the sum of \$932.00 (R. 305).

4. *Instructions to the Jury, Verdict and Decision of the Trial Judge.*

The foregoing testimony on the question of value was submitted to the jury under usual instructions in land condemnation cases (R. 324-337). In this connection the jury was cautioned to remember the uncertain effect of the water level of the lake, which fluctuated from year to year, upon the value of the land (R. 330), and specifically instructed to bear in mind the reservation, "which in this instance is very important" (R. 327). It was emphasized that the effect of the reservation would be to

exclude the purchaser from livestock feeding operations on a portion of the land for five years, that this would be a considerable factor in setting the price which a willing purchaser would pay, and that the jury “must consider this reservation in fixing the fair market value” (R. 332).

The Court also instructed that the defendants’ appraisers had “entirely disregarded” the reservation in their estimate of value, but that the Government appraisers had given “full weight” to the reservation (R. 334). The term “reservation” was referred to no less than seventeen times in the instructions, and the form of verdict, which was read to the jury, also specified and described the reservation and made it clear that the “just compensation” was to be “subject to the reservation” (R. 337).

The jury returned a verdict in the amount of \$36,500.00 (R. 55) and judgment was entered thereon (R. 56). The Government then filed a motion to set aside the judgment and verdict and for a new trial, on the grounds (1) that the verdict was excessive, (2) that it was not supported by any competent evidence, and (3) that it was the result of passion, prejudice and caprice (R. 59).

Upon the hearing of this motion the trial judge set aside the verdict and judgment, but instead of granting a new trial ordered that the declaration of taking be stricken and the case dismissed (R. 60). In doing so, he held that the verdict was excessive, but only for the reason that the jury did not give proper value to the reservation; that it was error not to submit the contract to the jury as evidence of value; that, on the other hand, the contract was not valid and binding and should be set aside, for reasons already stated, and that the declaration of taking, being based on the contract, should also be set aside (R. 341-4).

Both parties have appealed from this decision.

SPECIFICATION OF ERRORS

A. On Appeal by Government.

As limited by the specification of errors in the Government brief (p. 7), the questions raised on appeal by the Government are whether the District Court erred:

1. In striking the declaration of taking, vacating the judgment thereon and order granting immediate possession, and dismissing the proceedings.
2. In refusing to enforce the contract between the landowners and the Government.
3. In holding that the contract between the part-

ies was negotiated by the agents of the Government in an unethical manner.

4. In holding that the landowners did not know what was in the contract.

It will be noted that the Government originally designated other points of alleged error not specified as errors in its brief and not argued as errors in its brief (See Points 2, 6, 8 and 9 (R. 69-70)). Therefore, the Government must be deemed as having waived these points on appeal. *Cyclopedia of Federal Procedure* (2d Ed.) Sec. 6197, Vol. 12, p. 182, and cases cited therein. It is also to be noted that appellants' specifications of error do not state wherein the trial court erred, as required by Rule 20 of this Court, and this point is not to be deemed as waived by appellees by argument in opposition to appellants' specifications of error.

B. *On Cross-Appeal.*

It is the position of appellees, as appellants on cross-appeal, that the District Court erred in the following respects:

1. In holding that it was error on the part of the Court not to submit to the jury the contract between the parties as a measure of damages in this case (R. 342) for the following reason: The contract had been set aside

on the ground of mistake, misrepresentations and concealment and thus could not be used for any purpose; the contract was not proper evidence of fair market value, was inadmissible as an offer of compromise, and the Government was estopped from claiming any error in not submitting the contract to the jury. (For designation of point on cross-appeal see R. 72, 352).

2. In holding that the verdict of the jury as to the value of the property involved was excessive (R. 342), for the reason that there is no evidence to support such a finding and for the further reason that the verdict was neither excessive nor based upon an erroneous application of the law, but was supported by substantial evidence. (For designation of point on cross-appeal see R. 72, 352)

3. In holding that the jury, in determining the value of said property, did not give proper value to the reservation retained by defendants and disregarded the instructions of the Court to give value to said reservation (R. 342), for the same reason stated under specification 2 above and for the further reason that it appears from the record that the jury did give proper value to said reservation. (For designation of point on cross-appeal see R. 72, 352)

SUMMARY OF ARGUMENT

A. On Appeal by Government.

1. The Court erred in striking the Declaration of Taking for the reason that, title having vested in the Government, the Government had no power to do so, and for the further reason that the Government failed to move to strike said Declaration and therefore waived its right to do so.
2. The Court did not err in refusing to enforce the alleged agreement to sell the land, for the following reasons:
 - (a) The contract was invalidated by the conduct and representations of Government agents, indicating that the Government both could and would condemn and take defendants' lands if they did not enter into said contract, regardless of anything that might happen.
 - (b) The contract did not correctly set forth defendants' understanding that they would have an option to lease back the lands.
 - (c) The Government agents concealed the fact that the contract would include settlement of all claims for use and occupancy of the lands.

- (d) The Government had the burden of proof that there was no deception and that all was fair, open, voluntary and well understood, but failed to satisfy this burden of proof.

B. On Cross-Appeal by Appellees.

1. It was error at the conclusion of the trial to hold that the contract should have been submitted to the jury as a measure of damages.
 - (a) The contract had been set aside on the ground of mistake, misrepresentation, concealment and overreaching and, therefore, could not properly be used as a measure of damages.
 - (b) The contract did not reflect the fair market price of the land.
 - (c) The contract was no more than an offer of compromise.
2. It was error for the Trial Court to set aside the verdict as excessive and to hold that the jury did not give proper value to the reservation indicated by defendants.
 - (a) A jury verdict is not to be set aside as excessive unless it is so clearly excessive as to

shock the conscience of the Court or unless it is manifest that the jury adopted a false theory of law in arriving at its conclusion.

- (b) The Trial Judge did not hold that the verdict exceeded the fair market value of the land, but only that the jury did not give proper value to the reservation indicated by defendants, and there is no evidence whatever to support any such finding.
- (c) Even if the verdict be considered as excessive, it should be cured by remittitur, rather than sent back for new trial, under the circumstances of this case.

ARGUMENT ON APPEAL BY GOVERNMENT

1. WHETHER COURT ERRED IN STRIKING DECLARATION OF TAKING.

We do not question the authorities cited in the Government brief to support the proposition that by filing the declaration of taking and depositing the sum estimated to be just compensation the United States became vested with title to the lands here involved and was powerless to withdraw the declaration and that the District Court was equally powerless to dismiss it. (Govt. Br. pp. 7, 8).

It is true that there is some logic in the position of the trial judge to the effect that since the Government filed its declaration of taking in reliance upon the agreement with the Hayes as to the amount to be paid for the land, if the agreement is to be set aside, so also the declaration of taking should be set aside (R. 344). It should be remembered, however, that when the agreement was first held to be invalid, and before any testimony on the question of land values was submitted to the jury, it was suggested to the Government that it might desire to file a motion to set aside the declaration of taking (R. 153). The Government attorney then called the Attorney General by telephone for instructions on that point (R. 153), and defendants' attorneys then informed the Government attorneys that since defendants preferred to keep the land it would be quite agreeable with them to have the declaration of taking set aside (R. 345). But instead of following this suggestion of the Court, consented to by defendants, and with full knowledge that the agreement would not be submitted to the jury as a measure of value (R. 153), the Government decided that it would rather risk the outcome of a jury trial and submit to the jury the question of the value of the lands involved. Even at the conclusion of the trial and after the verdict the Government did not move to set aside the declaration of taking, but only for a new trial (R. 59).

Therefore, despite the logic of the position of the trial judge *at the time when his proposal was first made*, there would be neither logic nor justice in setting aside the declaration of taking after the Government had deliberately chosen such a course of action and after defendants had been put to the expense and hazard of a jury trial. It follows that appellees are in agreement with the Government upon appellant's first specification of error, although for somewhat different reasons.

II. THE COURT DID NOT ERR IN REFUSING TO ENFORCE THE AGREEMENT TO SELL THE LAND FOR A SPECIFIED SUM.

Specifications 2, 3 and 4 of the Government brief (p. 7) may well be discussed together, as was done in its brief (pp. 8-11). The ultimate question, as stated by the Government brief (p. 8), is whether "the Government was entitled to have judgment entered for the amount stipulated in its contract with the defendants".

It is submitted, however, that this question cannot be resolved as simply as the Government would suggest, i.e., upon the grounds that a *valid* agreement between the Government and a landowner fixing the purchase price of the land in event of condemnation is enforceable; that this contract was "unexceptionable"; that defendants *at that time* were satisfied with the contract, and should not be allowed to "change their minds"; that

the defendants were not incompetent, and that the Government agents were under no obligation to see that the contract was submitted to defendants' attorneys before it was signed by defendants (Govt. Br. pp. 8-11).

Independently from these considerations there are several reasons why this agreement is unenforceable and why it does not estop the defendants, as alleged by the Government (R. 41), from seeking true and "just compensation" for their lands, as determined by a jury, although in excess of the amount specified in the contract. These reasons include the following:

- A. *The contract is invalidated by the conduct and representations of Government agents indicating that the Government both could and would condemn and take defendants' lands if they did not enter into the contract, regardless of anything that might happen.*

Defendant Mary I. Hayes testified that "Mr. Schaar told us that the Government would get our land anyway. * * * If he had said, 'If this land goes too high the Government will give it back to you, we wouldn't take it,' * * * we wouldn't have signed anything" (R. 131). See also testimony of defendant Marcellus B. Hayes that "* * * they impressed on us that it was only a matter of time until they would take it away from us * * *" (R. 116) and that he would only willingly abide by the contract "if there is no such thing as getting possession

of the land again'' (R. 127). Government agent Woodward admitted that ''The fact that there was a condemnation action pending against the land was discussed, and I indicated that that suit showed the intention of the Government to acquire the title'' (R. 137).

In other words, defendants were given to understand that the Government had unalterably decided to take their lands, come what may, and had the right to do so, and on this understanding entered into a compromise agreement rather than be involved in protracted and expensive litigation which could only end in the acquisition of the land by the Government. As a matter of fact, however, the Government had no such unalterable intention to take this land, at all costs, but intended that if the jury verdict was too high it would let the landowners keep their land. This intent is demonstrated by what actually happened in other condemnation cases in the Malheur Lake area, in which the Government declined to take the land in many cases where jury verdicts were too high to please the Government and let the lands remain with their previous owners, after putting them and their attorneys to the expense and trouble of prolonged litigation. The Government attorneys in this case will admit that this was true. And, of course, the Government had this legal right under the provisions of the Declaration of Taking Act, as long as no declaration had been filed. See 40 U.S.C.A. Sec. 258 (a).

Thus there was a real possibility that by not signing the contract defendants would be able to retain their land, which was their primary desire, and ample basis for the finding by the trial judge in his oral opinion in this case that

“* * * whether these agents of the Government directly *promised these people or not or represented for the Government that the Government was going to take this land in spite of everything*, I think that the representation was made by the circumstances and by what had been said in court and out of court for a good many years. I am not casting any blame on the attorneys for the Government who are presently representing it, but the Department does have some responsibility and there are some people in the Department who have been cognizant of this situation all the time that I have. So I think that that representation was made and I don't think it was carried out, and I think it was one on which they have some right to rely.” (R. 151).

That this representation, and the resulting misunderstanding by defendants of their legal rights and those of the Government, requires that the contract be set aside is made clear by the following rules of law as stated by *Pomeroy's Equity Jurisprudence*, Sec. 849, quoted with approval in the case of *Order of United Commercial Travelers v. McAdam*, (C.C.A. 8th), 125 Fed. 358, 369:

“A person may be ignorant or mistaken as to his own antecedent existing legal rights, interests, du-

ties, liabilities, or other relations, while he accurately understands the legal scope of a transaction into which he enters, and its legal effect upon his rights and liabilities. ** Courts have felt the imperative demands of justice, and have aided the mistaken parties, although they have often assigned as the reason for doing so some inequitable conduct of the other party, which they have inferred or assumed. The real reason for this judicial tendency is obvious, although it has not always been assigned. A private legal right, title, estate, interest, duty, or liability is always a very complex conception. It necessarily depends so much upon conditions of fact that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest, or liability separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person, with respect to his own private legal rights and liabilities, may be properly regarded—as in a great measure they really are—and may be dealt with as mistakes of fact. * * *

“Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal status, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative; treating the mistake as analogous to, if not identical with, a mistake of fact.”

In a case somewhat similar to the instant case, although involving an action under the Tucker Act, the validity of a compromise agreement for taxes induced

by misrepresentations of a Government agent as to its right to enforce payment of such taxes was in question. Thus, in *Staten Island Hygeia Ice & Cold Storage Co. v. United States* (C.C.A. 2nd), 85 F. (2d) 68, at 71-72, it was held as follows:

“* * * to allow the government to insist upon a compromise induced by its agent’s misrepresentation of its rights against a taxpayer, * * * would be highly inequitable and is not sanctioned by the authorities.

* * *

“Between private parties it seems to be well established that equitable relief may be had where a mistake as to the plaintiff’s legal rights is induced by misrepresentations, even though innocently made, if it is reasonable for the plaintiff to rely upon the presumably greater knowledge of the defendant.

* * *

“It should make no difference that the United States is the party against whom the rescission is sought. * * * where the United States seeks to adopt the benefit of an agent’s act in procuring the offer of compromise it must also take the burdens accompanying that act.

“If the deputy collector acted beyond his authority * * * his agency was nevertheless ratified when the government took advantage of the offer he had procured.”

Finally, as stated in *In re Construction Materials Corp.*, 18 F. Sup. 509, at 519, 526, quoting *Williston on Contracts*, Secs. 1544 and 1500:

“Where the parties assumed a certain state of facts to exist, and contracted on the faith of that

assumption, they should be relieved from their bargain if the assumption is erroneous.

* * *

“It is not necessary in order that a contract may be rescinded for fraud or misrepresentation that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient. For though the representation may have been made innocently, it would be unjust to allow one who has made false representations even innocently, to retain the fruits of a bargain induced by such representations.”

It is therefore submitted that since in this case defendants were under a complete misapprehension of their legal rights and liabilities, as well as those of the Government, and of the true nature of the relation between the Government and the owner of land against which the Government has filed condemnation proceedings, and since it is clear that defendants would not have signed the contract in question if they had correctly understood these rights, liabilities and relations, and, particularly since in this case defendants' misunderstanding arose because of the active conduct and representations of agents of the Government, the established rules of law set forth in the above-quoted cases prohibited the Government from enforcing the contract in this case and justified the trial court in setting it aside.

B. *The contract is further invalidated by the reason that it did not correctly set forth defendants' understanding that they would have an option to lease back the lands.*

Defendant Marcellus B. Hayes testified that it was his understanding that the contract of sale was “along the lines that we had agreed upon”; that it was not only to provide for a reservation for five years of the use of part of the lands, but that it was also to provide that after the five year reservation defendants should have an option of leasing this land for as long as they wanted it. (R. 119-120). This was not denied by Government witnesses.

Based upon this testimony the trial judge made the following finding in his oral opinion on the case :

“On the other hand, the contract itself was negotiated in a way which makes me believe that the Hayeses didn't know what was in the contract. The testimony of Hayes, given on the witness stand, indicated to me that he had very carefully worked out a reservation that he desired and he expected to get. That reservation was that he should have this land free for five years, at the end of that time that he should have an option to lease it at a price to be agreed upon under the rules and regulations laid down by the Secretary of the Interior, and that when that time had elapsed he had another option. Now, those options, in my opinion, are of great value, even with the reservation that the Secretary of the Interior could lay down rules upon which the value of the lease would be computed, or the value of the rental.

“ * * * it certainly was unethical to write into the contract things that they did not agree to and stipulations entirely contrary to what their agreement was. I have no doubt that Mr. Hayes' testimony was

correct and that that is what he stipulated for and that is what he thought he was getting." (R. 343-4)

The applicable rule of law in such a case is well stated in *Clarksburg Trust Co. v. Commercial Casualty Ins. Co.*, 40 F. (2d) 626, 630, quoting from *Pomeroy, Equity Jurisprudence* (4th Ed.), Sec. 845:

"If, * * * after making an agreement, in the process of reducing it to a written form the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement, or by cancellation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact."

To the same effect, it was held in *John T. Stanley Co. v. Lagomarsino*, 53 F. (2d) 112, at 114, as follows:

"* * * an assertion that the writing does not represent the real agreement of the parties and was executed through fraud or mistake, and if established it is of course a good defense to a suit to enforce the written agreement."

So also, in *19 Am. Jur.* p. 75, the rule is stated as follows:

"Relief may be had where it is shown that, by means of mistake, a written contract does not express the agreement of the parties thereto, notwithstanding the language of the writing is that which was agreed on by the parties. Relief may be sought on account of the omission from a written contract of a provision upon which the parties had agreed."

It is therefore submitted that since the contract did not express the agreement of the parties in one important respect, i.e., the right of defendants to an option to lease, and was executed by defendants through mistake in this respect, it cannot be enforced by the Government and should have been set aside, as was held by the trial court.

C. *The concealment by Government agents of the fact that the contract would include settlement of all claims for use and occupation of the land also invalidated the contract.*

Defendants Marcellus B. Hayes and Mary I. Hayes testified that they did not know that the contract would include a settlement of their claims against the Government for use and occupation of their lands (R. 105, 106, 118); that the reference in the contract to the "Tucker Act" meant nothing to them because they didn't know what the Tucker Act was (R. 105). and that the Government representatives made no mention or explanation of the fact that the contract would include a settlement of these claims (R. 105, 118). One of the Government agents testified that after agreeing upon the sum of \$16,000.00 as a compromise figure for the condemnation of the land and "shortly before I left the house I indicated to them that we would like in that settlement to include the claims under the Tucker Act." (R. 137). The contract provided that the vendors

agreed to divest themselves of “all right, title or interest to said land, including any claims, or compensation for damage or right they might have under and by virtue of what is known as the ‘Tucker Act’ ” (R. 51). Finally, as the Government attorneys will concede, these so-called “Tucker Act” cases had been filed and were then pending in court and were being handled by attorneys for the Hayes on a contingent basis.

Based on this evidence it was found by the trial judge in his oral opinion as follows :

“* * * I don’t think that they knew that they were compromising the damage claim they had against the Government” (R. 343).

In considering whether this is a sufficient ground for setting aside the contract it must be remembered that Mr. Hayes was over eighty-two years of age and his wife over seventy-two years of age ; that they were represented by attorneys ; that despite knowledge of these facts the Government agents came to their home, told them that if they didn’t sell the Government would take their land by condemnation, and induced them to sign the contract in question, not even before a notary public (*supra*, p. 4). Under these circumstances it is clear that defendants relied and had a right to rely on the Government agents to disclose all facts material to the execution of the contract. As Mrs. Hayes said, “I simply

trusted to what Mr. Schaar said * * * '' (R. 104). That the Government agents, under these circumstances, and after purposely evading defendants' attorneys, must have known that defendants would rely upon them and upon their making a full and fair disclosure is obvious.

The rule of law applicable to such facts is stated in the case of *Davis v. Commissioners of Sewerage*, 13 F. Sup. 672, at 678, as follows:

“ * * * where one party to a contract knows that the other relies on him disclosing fully all facts material to the execution thereof, a duty rests on such person to not conceal anything material to the bargain, and if there is concealment resulting in damage to one, the other causing it must assume the entire responsibility.”

As further stated in *Winget v. Rockwood*, 69 F. (2d) 326, at 332:

“Equity will even relieve against a mistake of law when the surrounding facts raise an independent equity, and where there has been a mistake of law by one party induced by misrepresentations, deceit, or undue influence on the part of the other, or where advantage has been taken *in any way* of one's ignorance of the law to mislead him or her into a relation of trust and confidence which has been abused, and this is especially true if the mistake inures to the advantage of the person whose advice is taken.”

These rules are particularly applicable where, as here, the Government is claiming an estoppel against defendants from asking to have just compensation for their land determined by the jury. Thus, as held in *Leathem Smith-Putnam Nav. Co. v. National U. F. Ins. Co.*, 96 F. (2d) 923, at 928:

“No estoppel arises from a mistake of fact, preventing the meeting of the minds of the parties; on the contrary an estoppel must have its origin in clearly understood facts and a waiver does not arise unless all material facts are disclosed. * * *

* * *

“If concealment of material facts exists, even though not intentional, it creates a mistake of fact that prevents consummation of an agreement, by the meeting of the minds upon agreed facts.”

It follows that where, as here, the defendants relied and were entitled to rely upon the Government agent to make a full and fair disclosure of all material facts, their failure to inform defendants that the contract would destroy their previous claims for damages for the use and occupation of their lands, at least in a way that defendants understood that they were compromising these claims, prohibited the Government from enforcing the contract and fully justified the trial court in setting it aside. Moreover, this court should not approve the practice of settling cases behind the backs of attorneys who have a contingent interest in any amounts recovered and this is a further reason why it was neces-

sary and proper to set aside the settlement agreements in this case.

D. *The Government had the burden of proving that there was no deception and that all was fair, open, voluntary and well understood, but failed to satisfy this burden of proof.*

As the record shows and as stated above, the Government agents well knew that defendants were represented by attorneys (R. 141, 142, 146). But instead of negotiating with these attorneys, whose office was within a mile from their office in Portland (R. 150), these agents went to Malheur Lake and sought to deal directly with an aged couple in their home and behind the backs of their attorneys. And upon inducing them to agreement these agents were so hasty to put it into written form and to circumvent defendants' attorneys that they telephoned Chicago by long distance for authorization, rushed out the next day and had Mr. and Mrs. Hayes sign it in their own home—not even in the presence of a notary public (*supra*, p. 4).

As held by the trial judge, this action was “entirely and absolutely unethical” (R. 151), and that “* * * it was entirely unethical to deal with those people in that way * * * ” (R. 343). This is one of the grounds upon which the trial judge set aside the contract (R. 151, 343). To sustain the contract executed under these cir-

cumstances and by these tactics would be to encourage this agency of the Government in tactics which it admits are a common practice (R. 142) and which should receive decisive condemnation by the courts by refusal to enforce any contract so induced.

But aside whether the moral impropriety and ethics of these circumstances furnish a sufficient and independent ground to set aside the contract, it is submitted that these circumstances at least impose upon the Government the burden of proving affirmatively that there was no deception, that all was open, fair, voluntary and well understood.

As held in the case of *Popovitch v. Kasperlik*, 70 F. Sup. 376, at 382, 384:

“Where the relationship between the contracting parties appears to be of such a character as to render it certain that they do not deal on equal terms, but that on one side from overmastering influence or, on the other side, from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, it is incumbent on the party in whom such confidence is reposed to show affirmatively that no deception was used, and that all was fair, open, voluntary and well understood.

* * *

“The rule is founded upon principles of public policy and is irrespective of any admixture of deceit, imposition, overreaching, or other causes of fraud. There must be full and clear proof that the

transaction was a free and an intelligent act of the party, fully explained to him, and performed with a thorough understanding of the transaction and of its consequences.”

In view of the facts of this case, as set forth above, it is clear that the above quoted rule of law is applicable to this case. It is apparent, however, that the Government did not satisfy this burden of proof, since it was found by the trial judge that there was misrepresentation and concealment by the Government agents and a lack of understanding by the defendants (R. 151, 343). It is therefore submitted that the trial judge was fully justified in refusing to enforce the contract and in setting it aside.

ARGUMENT ON CROSS-APPEAL BY APPELLEES

I. IT WAS ERROR AT CONCLUSION OF THE TRIAL TO HOLD THAT THE CONTRACT SHOULD HAVE BEEN SUBMITTED TO THE JURY AS A MEASURE OF DAMAGES.

Although not assigned as an error by the Government in its motion to set aside the verdict and for a new trial (R. 59), the trial judge, in his decision setting aside the verdict, striking the declaration of taking and dismissing the case (R. 342-5), held not only that the verdict was excessive (R. 342) but also as follows:

“There is another reason why the verdict can’t stand. The Court was in error in not allowing the Government to show what the contract was. If the jury had found that these people had agreed to the

value that they did on that contract, I am quite sure they would not have returned the verdict that they did.” (R. 342-3)

The Government not only did not include the failure of submitting the contract to the jury as a ground in its motion to set aside the verdict, but also failed to specify it as an error on appeal and to argue this point in its brief. Therefore, it would appear that the Government cannot now complain of the failure of the trial court to submit the contract to the jury, either as a measure of damages or otherwise.

If, however, this Court should desire to consider this matter, appellees and cross-appellants submit the following argument why the trial court was correct in not submitting the contract to the jury as a measure of damages and why it erred in later holding that the contract should have been so submitted.

A. *Since the Contract was Properly set aside on the Ground of Mistake, Misrepresentations, Concealment and Overreaching, it could not be used as Measure of Damages.*

In this case, after setting aside the contract fixing the value of defendants’ property in the event of condemnation proceedings for the reasons set forth above (supra, p. 7 to p. 8; see also R. 151, 343), and therefore refusing to hold that defendants were bound by the

contract or to submit it to the jury as a measure of damages, the trial judge later, after conclusion of the trial, held that it was error not to submit the contract to the jury for that purpose (R. 342).

While it is true that a contract induced or executed by mistake, misrepresentations, concealment or overreaching is not wholly void, but is voidable at the election of the party so induced, it nevertheless remains true that when, as in this case, such an election is exercised and such a contract is set aside, it then becomes void *ab initio*, as though never executed, and neither party can thereafter claim anything based upon such a contract. It follows that it was entirely proper for the trial court in this case, after setting aside the contract for these reasons, to exclude the contract from evidence as a measure of damages. It also follows that it was error for the trial judge to hold later that he had erred in not submitting the contract to the jury for that purpose (R. 342-3).

Moreover, the same reasons which were relied upon by the trial judge in setting aside the contract apply with particular weight as objections to the use of the contract as a measure of damages and render it invalid for that purpose. In this case, as pointed out above (*supra*, pp. 4-6), defendants executed the contract under a mistaken understanding of their rights and liabilities

and those of the Government, and believed that the Government was determined to take their lands, come what may, and regardless of the amount of any jury verdict. This misunderstanding went directly to the price at which they agreed to sell their lands. For they testified that had they known that if they held out and a jury had returned a verdict higher than the Government wanted to pay, they could then keep their land, they then would have refused to sell at any price because of their desire to keep their farm (R. 113-4, 115, 131).

Similarly, the understanding that they were to have an option to lease the lands for as long as they liked (R. 119-120), a further ground for setting aside the contract, went directly to the propriety of its use as a measure of damages, for the reason that if defendants had understood that they were not to have such an option they undoubtedly would have insisted upon more money. For the same reason, defendants' failure to understand that their claims under the Tucker Act were to be included in the settlement went directly to the amount for which they were willing to sell, and if they had correctly understood the facts they would not have agreed upon any such figure.

Therefore, since the very grounds for setting aside the contract reflect directly upon the propriety of its use as a measure of damages, and since the contract,

once set aside, became void ab initio, it would have been entirely erroneous for the Court to have submitted it to the jury for that purpose.

B. *The Contract did not Reflect what an Owner Willing, but not Required to Sell and a Buyer able and Willing to Buy would have Agreed upon as a Purchase Price.*

In this case both defendants testified that they did not want to sell their farm and that the only reason for signing the agreement was that they were told and understood that if they did not do so the Government would take their lands anyway (R. 97, 103, 108, 111, 112-15, 116, 130-1). They testified that "if we were selling this land otherwise we would ask a lot more money for it, but since the Government was going to take it and it had to go through court we compromised on that basis, in order to keep it out of the court and the expense of the court trial" (R. 103; see also R. 114, 119, 123).

Under these circumstances it is clear that the price set forth in the contract was not a figure agreed upon by a seller who was willing, but not required, to sell, as is the recognized requirement in arriving at the fair market value of land. Moreover, in condemnation proceedings the landowner has a constitutional right to receive "just compensation", which is the fair market value of his lands, no more and no less. To pay him less

would be to violate his constitutional right. *Garrow v. United States*, 131 F. (2d) 724, 726. It therefore would have been wholly improper for the contract to have been submitted to the jury as a measure of damages or as evidence of the fair market value of the lands involved in this case.

C. *The Contract was no more than a Compromise Offer.*

It appears from the record that even after the contract was set aside it was offered by the Government in evidence as an offer in writing by defendants to sell their lands on the terms set forth in the agreement (R. 165).

It is a universally recognized rule of law, however, that offers made for the purpose of compromising litigation are not admissible as evidence of admissions on the issue of damages. Since the agreement in this case is not binding as a contract, for reasons stated by the trial judge and as pointed out above, its only possible remaining use could be as an admission of an offer by defendants to sell their lands at the figure stated therein.

While cross-appellants contend that the contract, once set aside, cannot be used for any purpose, and particularly on the question of market value and as a measure

of damages, for reasons stated above, if it be held to the contrary appellants then contend that the contract is further inadmissible as a source of admissions by the landowners as to the value of their lands, for the reason that any such admissions, including the entire agreement, were recognized by both parties as nothing more than a compromise of pending litigation.

The term "compromise" was used again and again by both defendants (R. 96, 97, 99, 100, 103, 111, 114, 115, 116, 129). The fact that the final terms were agreed upon solely as a means of compromising pending litigation and avoiding the expense and delay of trial was also recognized again and again (R. 111, 119, 129). The Government agents themselves testified that "* * * we discussed it solely from the standpoint of 'Can we compromise our difficulties and settle the entire situation on the lake?' And we eventually arrived at a compromise figure of \$16,000 in cash and five years use of * * * Parcel 48 and the upland" (R. 137).

This, of course, is one of the basic reasons for the rule excluding from evidence all offers of compromise, i.e., to encourage friendly settlement of disputes. Therefore, it follows that the agreement was inadmissible as a measure of damages or as evidence of the fair market value of the land for this reason alone, if for no other.

D. *The Government is Estopped from Complaining of any Error in the Failure to submit the Agreement to the Jury as a Measure of Damages.*

In this case defendants' counsel stated on the record his desire that the contract and the circumstances surrounding its execution should be submitted to the jury (R. 90). The Government, however, had prevailed upon the Court to determine the validity of the contract sitting alone, without a jury. It was only because of this circumstance, and after the contract had been held to be invalid, that defendants later objected to the admission of the contract before the jury (R. 165).

It follows that since defendants originally desired to have the contract and all of the attending circumstances submitted to the jury but were prevented from doing so by the Court at the request of the Government, neither the trial judge nor the Government are in a position to complain that this was not done, and any error from the failure to so submit the contract to the jury was invited by the Government. Therefore, under the doctrine of "invited error", the Government cannot complain.

In addition, as already pointed out, the Government did not include this alleged error as a ground in its motion to set aside the verdict and for a new trial (R. 59). Nor did the Government specify it as an error on appeal or argue the point in its brief. Thus the Govern-

ment must be considered as having waived any such error and cannot now complain of the failure to submit the contract to the jury as a measure of damages.

II. IT WAS ERROR FOR THE TRIAL COURT TO SET ASIDE THE VERDICT OF THE JURY AS EXCESSIVE AND TO HOLD THAT THE JURY DID NOT GIVE PROPER VALUE TO THE RESERVATION RETAINED BY DEFENDANTS.

In setting aside the verdict, it was held by the trial court as follows:

“The verdict was, in the opinion of the Court, excessive. I think that the jury did not give proper value to the reservation. The reservation of five years without rental upon that land, in my opinion, is worth a great deal more than the Court believes the jury gave to it. As I view the jury’s verdict, they took Howard’s figure, which was on the basis of forty thousand dollars for the fee simple title, and appraised the reservation at four thousand, and I think that is an improper result, and I, in the instructions, very carefully cautioned them to give value to that reservation but they didn’t do it, so I take it that they did not follow the instructions. It is true they did not have to, but they are supposed to pay more attention to what I say than what they did, and as a result of it the verdict can’t stand.”
(R. 342)

It is the position of cross-appellants that this finding of the trial court was error for the reasons stated below, which will be submitted as a consolidated argument under cross-appellants’ specifications 2 and 3.

A. *A Jury Verdict is not to be set aside as Excessive unless it is so clearly Excessive as to shock the Conscience of the Court or unless it is Manifest that the Jury adopted a false Theory of Law in arriving at their Conclusion.*

The proper tests to be applied by the trial courts in determining whether to set aside a verdict alleged to be excessive are set forth in the following cases :

The Supreme Court of the United States, in *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 74, 9 S. Ct. 458, held that a federal trial court, in determining whether to set aside a verdict as excessive, should apply as a test whether “damages are *palpably and outrageously excessive*”.

In *Smith v. Pittsburg & W. Ry. Co.*, 90 Fed. 783, 788, the Court held that :

“A verdict should not be set aside simply because it is excessive in the mind of the court, but only when the excess is *shocking to a sound judgment and a sense of fairness to the defendant*. Where there is any margin for *a reasonable difference of opinion* in the matter, the view of the court should yield to the view of the jury, rather than the contrary.”

Similarly, in *Burris v. American Chicle Co.*, 33 F. Sup. 104, 108, it was held that in a motion to set aside a verdict as excessive the Court must assume

“ * * * all the facts that the plaintiff’s testimony reasonably tends to prove, together with all inferences in plaintiff’s favor which may fairly be drawn from the facts * * *. It is not a sufficient ground for a new trial that a verdict is merely against the preponderance of the evidence, but *it must be so clearly against the evidence as to compel the conclusion that the verdict is contrary to right and justice.*”

It was held in *Malone v. Montgomery Ward & Co.*, 38 F. Sup. 369, at 370, as follows:

“On a motion to set aside the verdict on the ground that it is excessive, or upon any other ground, the judge should not substitute his judgment for that of the jury, and where a motion is made upon the ground that the verdict is excessive, the verdict should not be set aside unless it shocks the conscience of the Court or unless it appears that the verdict was based upon prejudice or bias and was excessive. * * * The test is whether the size of the verdict * * * shocks the conscience of the Court, that is, whether the verdict itself indicates that it was the result of prejudice, bias or sympathy.”

The same test, requiring the verdict to be so excessive as to “shock the sense of justice of the Court”, was applied in *Zarek v. Fredericks*, 49 F. Sup. 64, and *Boyle v. Ward*, 39 F. Sup. 545. See also *Kaufman v. Atlantic Greyhound Corp.*, 41 F. Sup. 252, and *Carberry v. Acme Transit Co.*, 203 Fed. 780.

The same tests have been applied by the federal courts in land condemnation cases. Thus, in *United*

States v. Certain Lands in Jackson County, 48 F. Sup. 591, at 592, it was held that:

“It (the verdict) must be approved unless erroneous legal principles effected it, there was no proper evidence upon which it could have been based, or unless it was the result of prejudice, fraud, or so *patently inequitable as to shock the conscience.*”

Again, in *United States v. 133.1 Acres of Land*, 42 F. Sup. 582, at 583, it was held that:

“ ‘Where the evidence submitted to the jury is such as to render the issue doubtful, a new trial will not be granted, even though the verdict is against the apparent weight of the evidence.’

* * *

“It must be so manifestly and palpably against the evidence as to compel the conclusion that the verdict is contrary to right and justice.”

And in *United States v. 1,192.9 Acres of Land*, 55 F. Sup. 995, at 996, it was held that:

“After a review of the evidence in this case, we cannot say that the verdict is manifestly and palpably against the weight of evidence herein. We therefore decline to disturb it.”

See also *United States v. City of New York*, 165 F. (2d) 526, 531.

Similarly, in *United States v. 2.4 Acres of Land*, 138 F. (2d) 295, it was held that a jury verdict based upon conflicting evidence

“ * * * will not be disturbed unless it is *manifest*, from all the circumstances in the case, that the jury adopted a false theory in arriving at their conclusion.”

It is also established in condemnation cases, as in other cases, that it is improper for a trial judge to rely upon personal investigation or upon evidence not in the record. *United States v. Dillman*, 146 F. (2d) 572.

Finally, in *Columbia Heights Realty Co. v. Rudolph*, 217 U.S. 547, 560, 30 S. Ct. 581, the Supreme Court of the United States in a land condemnation case laid down the following principles :

“The power of the Court to review the award by such a jury must, in the very nature of the matter, be limited to plain errors of law, misconduct, or grave error of fact indicating plain partiality or corruption. * * * The jury was expected to exercise its own judgment, derived from personal knowledge from a view of the premises, as well as from the opinion evidence which might be brought before them.”

We will now demonstrate that in this case the verdict of the jury did not proceed under any erroneous theory of law, was supported by substantial evidence, and was not excessive under the established tests set forth above.

B. *The Trial Judge nowhere held that the Verdict exceeded the fair market Value of the Land, but only that the Jury did not give proper Value to the Reservation retained by Defendants, and there is no Evidence whatever to support any such Finding.*

In this case defendants' witness who appraised the lands in question for all purposes and uses testified that the fair market value of such lands was the sum of \$40,245.00 (R. 238, 242). The other witness for defendants, who was careful to base his appraisal of the lands "as a stockraising deal", as distinct from "an overall purpose" (R. 259), testified that the lands were worth \$23,885.40 for stockraising purposes alone (Id.) The latter witness testified that his appraisal did not consider the value of the five year reservation of a portion of the lands (R. 261). No questions or objections were addressed to the testimony of the first witness on this point, however, although it must be conceded that his testimony was upon the basis of the fair market value of the lands without reference to the reservation (R. 242).

One Government witness testified that the land was worth \$10,800.00 (R. 291), the other that it was worth \$9,922.00 (R. 311). Both of these witnesses considered the value of the reservation in their appraisal (R. 291, 310-11), and the former witness also testified that the five year reservation on the so-called "deeded lands" (uplands) and on Tract No. 48 of the lake-bed lands was worth \$932.00 (R. 305).

The verdict of the jury found that the "fair market value" of the lands "reserving the right to use in live-

stock ranching operations, such as harvesting hay and the feeding and grazing of stock, the surveyed lands and Special Master Tract No. 48 * * * for a period of five years * ** and the just compensation to be paid for the taking of said lands, subject to said reservation, is the sum of \$36,500.00” (R. 55).

It will be noted that the trial judge not only did not hold but nowhere even intimated that the verdict of the jury exceeded the fair market value of the lands (R. 342). His only ground for setting it aside as excessive was that the jury “did not give proper value to the reservation” (Id.) Thus the sole question to be considered on appeal on the issue of excessiveness of the verdict is whether there is any substantial evidence to support the finding that the jury did not give sufficient value to the reservation.

In this connection, it is submitted that the following evidence shows conclusively not only that there was no evidence whatever to support such a finding, but on the contrary, there was substantial evidence that the jury did properly consider the value of the reservation :

1. The jury was cautioned to remember that the testimony of defendants’ witnesses “is not to be taken without some very considerable consideration upon your part as to the reservation * * * a very important reservation (R. 263).

2. The jury was carefully instructed to give value to the reservation. Reference to the reservation was repeated again and again in the instructions. And the form of verdict specifically stated that the amount of the verdict was the fair market value of the lands, subject to the reservation (R. 327-337; 55. See also p. 11, *supra*).
3. The jury went to view the premises, but the trial judge did not do so (R. 85) and thus has no basis for substituting his own judgment for that of the jury.
4. The verdict of the jury as to the value of the lands, less the reservation, was nearly \$4,000.00 less than competent testimony as to the value of the lands, while the only direct testimony as to the value of the reservation was that it was worth \$932.00.
5. The reservation did not run to all of the lands condemned, which totaled 1,101.68 acres (R. 30), but only to the deeded lands or uplands, totaling approximately 174 acres (R. 314-5), and to Tract 48 of the lake-bed lands, totaling 320 acres (R. 289-290).
6. The reservation was not for all purposes, but was limited to use in "livestock ranching opera-

tions'' and, more particularly, to harvesting hay and ''feeding and grazing of stock'' (R. 29).

7. Assuming for the purpose of argument alone, but not admitting, that a reservation for five years is worth twenty-five per cent of the value of the fee simple title, as indicated by the trial judge (R. 339), when it is remembered that the reservation was for only 494 acres of a total of 1,101.68 acres, or approximately forty-five per cent of the entire acreage; that the reservation was for a limited use and that from the date of the verdict (September 25, 1947, R. 56), there was little more than four years for the reservation to run (from October 9, 1946, R. 55), it appears that the Government appraiser was entirely correct in estimating the value of this particular reservation as approximately ten per cent of the value of the fee simple title of the entire tract.
8. It also follows that it was entirely proper for the jury to have accepted the ''Howard figure, which was on the basis of forty thousand dollars for the fee simple title, and appraised the reservation at four thousand'', as found by the trial judge (R. 342), or at ten per cent of the value of the fee simple title of the entire tract.

It follows that the verdict of the jury was not excessive and did not proceed on an erroneous theory of law, but was supported by substantial evidence and, at least, cannot be set aside as having been based upon a failure to give proper value to the reservation—the only ground suggested by the trial judge (R. 342).

C. *Even if the Verdict be considered as Excessive it should be cured by Remittitur rather than sent back for new Trial, under the Circumstances of this Case.*

For the reason set forth above, cross-appellants strongly insist that the verdict in this case was not excessive, but was entirely proper. If, however, this Court should determine that the verdict was excessive, and without in any way retreating from this position, it would then be the request of cross-appellants that this Court exercise its power of determining the amount of any such excess and suggesting a remittitur of such amount as a condition of denying a new trial of the case.

That this Court has ample power to suggest such a remittitur in such a case is established in the case of *United States v. Certain Parcels of Land*, 149 F. (2d) 81, 83, in which it was held as follows:

“We recognize that the practice of requiring remittitur in the appellate courts, while almost universal in the states, is not established in federal appellate courts. We see no reason, however, par-

particularly in a condemnation case, why in the interest of saving the time and expense attendant upon a new trial, the practice should not be resorted to.”

The reasons for remittitur stated in the above quoted case apply with particular force in this case. Here the principal cross-appellants are an aged couple. They are in need of funds (R. 94, 96). The litigation involving their property in Malheur Lake has now lasted over twelve years, since the Government first took over the lake-bed in 1936 for a bird refuge, as this Court well knows. These defendants may well not live for the months or years required for a further trial and possible appeal in this case. It is therefore submitted that this case is particularly suitable for the exercise by this Court of its power to suggest a remittitur as a condition of denying a new trial. Therefore, while cross-appellants still contend that the verdict was not excessive and should be reinstated, rather than set aside for a new trial, if this Court should determine that the verdict was excessive, cross-appellants will and do hereby agree to a remittitur in the amount found by this Court to be excessive as a condition of reinstating the verdict and denying a new trial of the case. As noted above, the only ground assigned by the trial judge in holding the verdict to be excessive was that the jury failed to give proper value to the reservation, while at the same time it was conceded by the trial judge that the jury considered the reservation was worth \$4,000.00—over four times the

amount at which the reservation was appraised by the Government. But if this Court should feel that some additional value should have been given by the jury to the reservation, cross-appellees would welcome the suggestion of a remittitur in any such amount rather than to incur the expense and delay of a new trial.

CONCLUSION

Much of the explanation for the decision by the trial judge in this case is apparent from his following statement in announcing his final decision:

“Well, I have tried to arrange this with you gentlemen, but you bring it up on a strict legal basis, and if you leave it that way I am going to rule on a strict legal basis. You have got your heads set, apparently, on the thing. I know the answer all the way through this case and I am going to give it to you. Now, if there is going to be no yielding on either side of this case, then you will have to take it as it is. (R. 341).

* * *

“Now, I have talked to you both about this case and I told you what you had better do and you haven’t done it, so if you want to put it on a strict legal basis now you are going to take a strict legal result, if that is the way you want to submit it.” (R. 342).

Only in the light of this statement is it possible to understand how a federal judge could reach the incongruous result of setting aside a verdict, on one hand, and a declaration of taking, on the other hand, and of

holding that a contract is to be set aside, but that it still should have gone to the jury for one purpose.

It is submitted, however, that this case should now be decided on the basis of a proper application of established principles of law to the facts of this case, as established by the evidence, and that to do so can only result in a decision by this Court as follows :

1. That the contract which the Government agents induced defendants to sign behind the backs of their attorneys, upon the basis of misrepresentations, concealment and mistake of law and fact, must be set aside for all purposes, including consideration as evidence of fair market value.
2. That the verdict of the jury was neither excessive nor based upon an erroneous application of the law, but was supported by substantial evidence and should be reinstated and judgment entered thereon.
3. That, in any event, the declaration of taking should be restored and not set aside.

Respectfully submitted,

EDWIN D. HICKS
JOHN W. McCULLOCH
THOMAS H. TONGUE, III
HICKS, DAVIS & TONGUE
*Attorneys for Appellees and
Cross-Appellants.*

In the United States Court of Appeals for the Ninth Circuit

No. 11900

UNITED STATES OF AMERICA, APPELLANT

v.

**MARCELLUS B. HAYES AND MARY I. HAYES, ALSO KNOWN
AS BELL HAYES, HUSBAND AND WIFE; ADELBERT M.
HAYES, AND HARNEY COUNTY, A MUNICIPAL CORPORA-
TION AND POLITICAL SUBDIVISION OF THE STATE OF
OREGON, APPELLEES**

AND

**MARCELLUS B. HAYES AND MARY I. HAYES, ALSO KNOWN
AS BELL HAYES, HUSBAND AND WIFE; AND ADELBERT
M. HAYES, APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

***UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON***

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

ARGUMENT

I

**The District Court lacked power to strike the declaration of
taking**

Since appellees concur in this view (Br. 17-19)
there is no need for further comment on this
proposition.

took it page by page (R. 144). Mr. Hayes admitted that he read it (R. 118); and Mrs. Hayes thought he had done so (R. 104). Before it was signed several hours were spent in discussion of its terms (R. 144).

Appellees do not assert—much less show—that they were hurt by failure to have their counsel on hand. However, even if they had been hurt, there would be no warrant for making the Government responsible. Appellees were aware of the possible utility of their lawyers: they had consulted them once and disregarded their advice. If they felt the need of further consultation, they could have had it. Moreover, if the lawyers had thought they might be needed, there was nothing to prevent Mr. McCulloch from so suggesting in his letter to Mr. Hayes. (Since he made no such suggestion, it must be assumed he was satisfied of appellees' capacity.) With appellees and their lawyers of the opinion that legal assistance would not be helpful, it would have been highly presumptuous for the Government representatives to insist that the lawyers be present. A man's lawyer is not his keeper.

Of a piece with the foregoing are suggestions (Br. 4, 32) that the Government hurried appellees into the contract. On the contrary, Mrs. Hayes testified there were three or four talks with Mr. Schaar (R. 97). And Mr. Hayes testified that Mr. Schaar visited the Hayes house "at different times" (R. 116). As already pointed out, execution of the contract was delayed until Mr. Hayes consulted the lawyers (R. 137, 140). When Mr. Schaar took the document to the Hayeses, he spent several hours discussing it with them before they signed (R. 144). Later, Mr. Wood-

ward had some doubt about the wording of the provision about the five years' free use. He reworded it and had Schaar take the revision to them for initialing (R. 138).

It is therefore manifest that in making the contract the Hayeses were not handicapped by incapacity, need of money, want of legal advice or pressure to act without necessary deliberation. Consequently their objections to the contract must depend solely on intrinsic worth. They dealt with the Government representatives as equals and at arm's length.

A. Appellees' incorrect impression that the Government could not abandon a condemnation proceeding is immaterial.—Appellees' assertion (Br. 20–25) that they would not have made the contract if they had known that the Government was not then bound to take the land furnishes no ground for setting aside the contract. It only means that, although they would not have contracted when only a condemnation petition was pending, they would have done so if a declaration of taking had been filed. Since that declaration was subsequently filed, the contract would have been executed in any event.² Moreover, the assertion is hardly credible. More probably appellees made the contract in order to avoid the expenses of litigation. Certainly, the avoidance of these expenses was much on their minds (R. 103, 110–111, 119, 122).

² Of course, if the contract had not been made, the Government might not have filed a declaration of taking; it might have been deterred by fear it would be compelled to pay an excessive award. But certainly it would have filed a declaration of taking had it known that—as appellees testified—they would agree on a price once their property was *taken*.

They could be avoided only if the issue to be litigated was settled by agreement. Otherwise, even if the Government after trial abandoned the proceedings because of an excessive award, the trial—and the consequent expense to appellees—was bound to occur.

B. *The parties did not intend that appellees should have an option to lease the lands.*—Appellees next assert (Br. 25–28) that the contract did not set forth *their* understanding that after the five-year use ended they would have an option to lease the lands. Even if this assertion were supported by the record, it would not invalidate the contract. The contract is good if it embodies the agreement of the parties; in other words, it is enforceable except in the case of mutual mistake. *Philippine Sugar &c. Co. v. Phil. Islands*, 247 U. S. 385, 389 (1918) and cases cited; *Staten Island Hygeia Ice & Cold S. Co. v. United States*, 85 F.2d 68, 71 (C. C. A. 2, 1936); *Clarksburg Trust Co. v. Commercial Casualty Ins. Co.*, 40 F.2d 626, 630 (C. C. A. 4, 1930). Appellees do not assert the existence of mutual mistake.

Furthermore, the appellees themselves did not make a mistake. The record shows:

The pertinent provision of the contract plainly excludes any option to lease. It makes the fee simple title “Subject to the reservation of the right to use in livestock ranching operations * * * the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five (5) years from the date hereof in accordance with rules and regulations of the Secretary of the Interior” (R. 48). Anyone who can read can understand that the provision deals with a five-year period and no more.

The provision was carefully drawn and specially called to the attention of appellees. It will be noted (R. 48) that it is initialed by each of the Hayeses. The reason for this is found in the testimony of Mr. Woodward, one of the Government's representatives. He testified (R. 138) that he "was not satisfied with the precise wording of the reservation of the five-years use. I felt it might lead eventually to difficulties from misunderstandings,—while the Hayeses and ourselves and Mr. Schaar understood each other, we couldn't be sure that everybody would be around five years,—so it was reworded and the original agreement was sent back to Mr. Schaar and he was requested to contact the Hayeses and get them to initial the revised pages, which he did."

It is clear that Mrs. Hayes understood the scope of the provision (R. 96). At one point at least, Mr. Hayes showed the same understanding (R. 128). The only basis for the view that he had a larger idea would have to rest upon the following excerpt from his direct examination (R. 119–120):

Q. Well, didn't you understand, or do you understand, that you still, if you want to avoid going through court, can take the money and let the Government have the land at the price stated in the agreement?

A. Well, it was a little more than sixteen thousand, they give us a five-year lease free,—that is embodied in the contract—and an option on the land if we wanted it. Of course, we would have to pay rental after five years, but the first five years we have the same privilege and the same rights we enjoy there at the

present time and the sixteen thousand, with an option on using this land as long as we wanted it.

Q. What I am getting at, Mr. Hayes, it is this, if I follow you correctly, you suggested you were willing to take the sixteen thousand and the five years' use to avoid going through court under those circumstances?

A. Yes sir.

Thus, the handle for this particular attack on the contract is found in an irresponsible answer to a question directed to quite another matter. This answer so little impressed the Hayeses' counsel that in his next question he persisted in his prior interpretation of the contract. Nor did he later attempt to draw a more expansive construction from Mr. Hayes or from Government witnesses. It is not surprising therefore that, as appellees observe (Br. 26) Mr. Hayes' outburst "was not denied by Government witnesses."

Appellees were not mistaken on this provision of the contract.

C. *The contract provision settling other claims against the Government was valid.*—Finally, appellees assert (Br. 28-32) that they were not told the contract would include a settlement of claims they had made against the Government for prior occupation of the land and contend that therefore the contract was invalidated.

On the question of fact the record shows the following:

At the trial appellees testified the damage claim was not mentioned in the negotiations (R. 104, 105-

106, 118). On the other hand, Mr. Woodward testified he brought it up at the meeting at which it was determined the Hayeses would consult their attorneys. He said that “shortly before I left the house I indicated to them that we would like in that settlement to include the claims under the Tucker Act so that we could clear up all phases of our troubles on Malheur Lake and square the thing away, and they indicated that was satisfactory, that when they were through with it they were through with it” (R. 137–138; see also R. 142).

Of course, the provision was in the contract when it was signed by appellees. Mrs. Hayes, however, said she didn’t know it was there (R. 105–106). Mr. Hayes testified he didn’t remember it (R. 118). The trial judge did not resolve the doubts engendered by these contradictions. Thus, although the foregoing testimony was given at the preliminary hearing on the contract, the judge did not at that time make any finding of fact. His sole reference to the matter occurred in the course of his remarks (R. 341–348) after the trial and prior to dismissing the proceedings. He said then (R. 343): “Besides that, I don’t think that [appellees] knew that they were compromising the damage claim they had against the Government.” Even if deemed to be a finding, this remark does not reject Mr. Woodward’s testimony. For aught that appears, the judge merely believed that the Hayeses were as heedless of what they heard as of what they signed. Accordingly, it may not be assumed that they were not told that—with their permission—the provision would be included.

But even if they were not so informed, the contract would not be invalidated. The provision *was* in the contract. Appellees could read and, if they did not understand, they could ask. They do not say the provision was concealed from them or erroneously interpreted. They say only that they were not told in advance that it would be in the contract. In an effort to show that the transmittal of such information to them was essential to a valid contract, they refer (Br. 29) to their ages and to the absence of their attorneys. The irrelevance of these considerations has already been pointed out (pp. 2, 3-4, *supra*). The fact is that they were capable of contracting. This being so, they were responsible for their acts and failures to act. Of course, the Government representatives were obliged to be honest. There is no suggestion they were not. But they were under no duty to represent appellees and of course did not purport to. Appellees understood this. True, they quote (Br. 29-30) Mrs. Hayes' statement (R. 104): "I simply trusted to what Mr. Schaar said * * *." Standing alone, this would convey the idea that appellees depended on the Government representatives to protect their interests. But Mrs. Hayes was not finished. She went on: "and I think Mr. Hayes read [the contract]. I thought he did anyway." Plainly, therefore, appellees' misunderstanding of this provision of the contract—if there was a misunderstanding—was not attributable to the Government and furnishes no ground for setting aside the contract.

ANSWER BRIEF FOR THE UNITED STATES, APPELLEE**QUESTION PRESENTED**

Whether the action of the trial court setting aside the verdict and the judgment entered upon it constituted reversible error.

ARGUMENT**I****THE TRIAL COURT RIGHTLY SET ASIDE THE VERDICT**

The jury found that the value of the fee to the condemned lands, subject to the reservation by the owners of free use for five years, was \$36,500 (R. 55-56). The Government moved to set aside the award and the judgment entered on it (R. 56-59) on the ground it was excessive (R. 59). The trial court granted the motion (R. 60-61). In this respect it did not err. The record shows:

Taking into account the use reserved by the owners, Government witnesses appraised the property at \$9,922 (R. 311) and \$10,800 (R. 291). Overlooking the fact of this reservation (R. 261, 262) the owners' witnesses valued the property at \$23,885.40 (R. 259) and \$40,245 (R. 242). Thus, the rejected award of \$36,500 was more than 300 per cent of the testimony of the Government, 225 per cent of the price fixed by the owners in the disputed contract and—if appraisals neglecting essential elements of value are entitled to credit³—more than 50 per cent above one of the

³ The Government's motion to strike the testimony (R. 262-263) was overruled (R. 263).

owners' witnesses but less than 10% below the nearly double figure of the other.

In the light of the foregoing, the Government deems it unnecessary to answer in detail the owners' contention (Br. 43-51) that even if the verdict was excessive it was not outrageous and in setting it aside the district judge abused discretion.

In conclusion—in consideration of a direction from this Court to the trial court to reinstate the verdict and shut off a new trial—the owners' offer to accept a remittitur of whatever amount this Court might determine should be cut from the \$36,500 (Br. 51-53). Assuming the ability of appellate courts so to act, it is plain that in this case the Court lacks information necessary to compute a remittitur. Whatever reduction it might order would be pure guess. In *United States v. Certain Parcels of Land, Etc.*, 149 F. 2d 81, 83 (C. C. A. 5, 1945), invoked by the owners, the court similarly unable to evaluate the testimony thought that the Government's estimate of just compensation provided a measure for the remittitur and so reduced the judgment to that figure. If this Court should take the same view of the estimate, it would order a remittitur of \$20,500 because the estimated compensation here is \$16,000, the contract price. It is to be doubted that such action would be acceptable to the owners.

CONCLUSION

It is submitted that for the reasons stated by the Government in its opening brief the order of the district court should be reversed and the cause remanded with directions to reinstate the dismissed proceedings and to enter judgment for defendants for the amount stipulated in the contract.

Respectfully,

A. DEVITT VANECH,
Assistant Attorney General.

HENRY L. HESS,
*United States Attorney,
Portland, Oregon.*

JOHN F. COTTER,

ELIZABETH DUDLEY,
*Attorneys, Department of Justice,
Washington, D. C.*

DECEMBER 1948.

No. 11901

United States
Circuit Court of Appeals
For the Ninth Circuit

MARY BRODERICK, Administratrix with the
will annexed, of the Estate of Eugene H. Ware,
deceased,

Appellant,

vs.

THE TRAVELERS INSURANCE COMPANY,
a corporation, and THE TRAVELERS IN-
DEMNITY COMPANY, a corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Idaho
Northern Division

FILED
JUN 24 1948

PAUL P. O'BRIEN,
CLERK

No. 11901

United States
Circuit Court of Appeals
For the Ninth Circuit

MARY BRODERICK, Administratrix with the
will annexed, of the Estate of Eugene H. Ware,
deceased,

Appellant,

vs.

THE TRAVELERS INSURANCE COMPANY,
a corporation, and THE TRAVELERS IN-
DEMNITY COMPANY, a corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Idaho
Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	35
Exhibit 1—Letter—10-21-36 to Eugene H. Ware Company.....	50
Appeal:	
Certificate of Clerk of United States Dis- trict Court to Transcript of Record on..	285
Designation of Contents of Record, and Statement of Points Upon Which Appel- lant Will Rely on.....	266
Notice of.....	93
Ordered Time for Filing and Docketing Record on.....	284
Appellees' (Respondents') Supplemental Des- ignation of Additional Portions of the Rec- ord, Proceedings and Evidence to Be In- cluded, and Motion.....	279
Certificate of Clerk of United States District Court to Transcript of Record on Appeal...	285
Complaint	2
Exhibit A —Contract Between Eugene H. Ware Co. and The Travelers Insurance Co., The Travel- ers Indemnity Co.....	16
A-1—Letter—10-1-36 to Eugene H. Ware Co.....	22

INDEX	PAGE
A-2—Letter—6-1-40 Subject— Commissions	23
A-3—Letter—9-20-39 Subject— Commissions on Automobile, Medical Payments Premi- ums	24
A-4—Letter—2-23-38 Subject— Commissions on Automobile Premiums	25
A-5—Letter—1-27-38 Subject— Commissions on Automobile Premiums	26
A-6—Letter—3-1-37 Subject— Commissions on Burglary Premiums—Securities In- surance Covering on the Premises of the Assured or in the Custody of Outside Messengers	27
A-7—Letter—3-10-31 Subject— Premier Residence Policy..	28
A-8—Letter—7-15-36 Subject— Commissions on Burglary Premiums—Securities In- surance Covering on the Premises of the Assured....	29
A-9—Letter—1-25-36 Subject— Commissions on Liability and Property Damage Pre- miums on Long Haul Truck- man Risks.....	30

INDEX**PAGE**

B —Power of Attorney.....	31
C —Renewal Certificate.....	34
Decree and Judgment.....	91
Designation of Contents of Records, and State- ment of Points Upon Which Appellant Will Rely	266
Findings of Fact and Conclusions of Law.....	77
Conclusions of Law.....	90
Findings of Fact.....	78
Motion for Leave to Amend Answer by Way of Trial Amendment.....	54
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	93
Opinion	65
Order for Inspection of Documents Before Trial	56
Order Granting Leave to Amend Answer by Way of Trial Amendment.....	273
Order to Require Plaintiff to Reply to the An- swer of Defendants.....	57
Order Waiving Printing of Original Exhibits.	287
Ordered Exhibits Be Forwarded to Circuit Court of Appeals.....	278
Ordered Time for Filing and Docketing Record on Appeal.....	284
Ordered Transcript Be Corrected.....	284
Petition to Have Original Exhibits Furnished Circuit Court of Appeals.....	277

INDEX	PAGE
Reporter's Transcript.....	93
Witnesses for the Defendants:	
Jordan, G. M.	
—direct	232
—cross	236
Peterson, George E.	
—direct	130
—cross	174, 246
—redirect	199, 228, 250
—recross	214, 254
Witnesses for the Plaintiff:	
Adams, J. G.	
—direct	255
Michaelson, Evelyn Thomas	
—direct	241
—cross	242
—redirect	243, 246
—recross	245
Nelson, Oscar W.	
—direct	109, 258
—cross	111, 263
Reply	51
Request for Admission Under Rule 36.....	271
Respondents' Designation of Additional Por- tions of the Record, Proceedings and Evi- dence to Be Included.....	274
Stipulation	58
Trial Amendment to Answer.....	55

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

EZRA R. WHITLA,
E. T. KNUDSON,
Coeur d'Alene, Idaho,
Attorneys for Appellant.

WM. S. HAWKINS,
C. H. POTTS,
Coeur d'Alene, Idaho.

CHARLES HOROWITZ,
2000 Northern Life Tower,
Seattle 1, Washington.
Attorneys for Appellees. *

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, for the
District of Idaho, Northern Division

No. 1562

EUGENE H. WARE,

Plaintiff,

vs.

THE TRAVELERS INSURANCE COMPANY,
a corporation of the State of Connecticut and
THE TRAVELERS INDEMNITY COM-
PANY, a corporation of the State of Connec-
ticut,

Defendants.

COMPLAINT

Plaintiff complains and for cause of action
against said defendants, alleges and states:

I.

That at all the times hereinafter mentioned, the
plaintiff, Eugene H. Ware, was and still is a citizen
and resident of Coeur d'Alene, Kootenai County,
Idaho and the defendants Travelers Insurance
Company and the Travelers Indemnity Company,
and each of them, were and still are corporations
organized and existing under and by virtue of the
laws of the State of Connecticut and doing business
in the State of Idaho, and that the amount involved
in this action exceeds the sum of \$3,000, exclusive
of interest and costs.

II.

That the plaintiff Eugene H. Ware also known
as E. H. Ware, since January 1, 1936, has been and

now is a duly qualified and licensed residence insurance agent according to the laws of the State of Idaho, and at all the times mentioned since he was qualified, has been and now is a licensed agent and resident of Coeur d'Alene, Kootenai County, Idaho. That the said Eugene H. Ware or E. H. Ware also does business as Eugene H. Ware Co., and the said defendants caused said plaintiff to be duly licensed as their resident agent in the State of Idaho and caused a certificate of said appointment to be made and delivered to the plaintiff, and the plaintiff at all the times hereinafter mentioned, [3] has been, and still is a duly appointed, qualified, acting and licensed resident insurance agent, and the duly appointed, qualified, and acting resident agent of the defendants, and in all of the acts herein alleged, acted as the resident agent of said defendants and doing the acts as herein set forth.

III.

That on or about the first day of October, 1936 the plaintiff entered into a written contract as such resident agent with the above named defendant companies and each of them, whereby said plaintiff was authorized by said defendants to write insurance on various types, a copy of which is hereto attached marked Exhibit "A" and made a part of this complaint as fully as if set out in full herein and plaintiff alleges that all of the statements contained in said contract are true and correct and that at all the time since Oct. 1, 1936, the plaintiff has been at the request of said defendants, and each

of them, licensed by the State of Idaho as a resident agent of said defendants and each of them and under said contract and under the laws of the State of Idaho, plaintiff was entitled as such resident agent to a commission as provided in said contract and Exhibit "A", on all policies written by the Companies and each of them, and submitted to said plaintiff for counter signature as resident agent of said companies and that the laws of the State of Idaho require that all insurance written by the defendants, who are foreign corporations, covering persons or property within the State of Idaho, be written through their duly licensed Idaho resident agents and only through through their duly licensed Idaho resident agents and further provides that it is unlawful for either of said defendants to write, place or cause to be made, written or placed in this State any policy, bond, duplicate policy or contract of insurance of any kind or character of any general or floating policy upon persons or property, resident, situated or located in this state unless done through agents who are residents of this State, legally commissioned and licensed to transact insurance business herein and that an Idaho resident agent shall countersign all policies of insurance so made (except policies [4] of life insurance,) and shall receive the full commission when the premium is paid, except when the policy is made, written or placed by a licensed broker in which event the countersigning agent shall receive a commission of not less than 5% of the premium paid and that all of the business written through the policies referred

to in this complaint were submitted to the plaintiff by the defendants and not through a licensed broker.

That with said original contract the said defendants furnished the plaintiff a letter of instruction, which is in reality a part of said contract, which is hereto attached marked Exhibit A1 and made a part hereof. That said contracts were amended by letters, true and correct copies of said amendments are hereto attached marked Exhibit A-2, A-3, A-4, A-5, A-6, A-7, A-8 and A-9.

IV.

That at all times since the 5th day of December, 1940, the plaintiff, Eugene H. Ware and Evelyn Thomas, an employee of the plaintiff, have been and are made, constituted and appointed by said Travelers Indemnity Company its true and lawful attorney-in-fact and with full power of authority for and on behalf of the Company as surety to execute and deliver and affix the seal of the Company thereto, to bonds, undertakings, recognizances or other written obligations in the nature thereof, not exceeding the amount of \$100,000 in any single instance under and by reason of a written instrument dated the 5th day of December, 1940 executed by said Travelers Indemnity Company, a copy of such instrument is attached hereto, marked Exhibit "B", and made a part of this complaint as fully as if set out herein and the facts stated in said Exhibit B are alleged to be true.

V.

That the said Travelers Insurance Company and the Travelers Indemnity Company, are concerns

owned, managed and controlled by the same persons and that they with other companies constitute what is generally known as the Traveler's Line, writing various kinds of [5] insurance and said business is done largely through the same agents and their business is so co-mingled that the plaintiff is unable to tell just what their relations are as they handle their business in a joint manner and largely as one Company and concern.

That the Travelers Insurance Co. is licensed to do business in the State of Idaho and to write within the State of Idaho all forms of liability insurance including workmen's compensation insurance, occupational disease insurance, employer's liability, public liability, automobile liability, auto property damage liability, contractor's liability and various other classes of liability insurance of which a more definite description cannot be given by this plaintiff, but which is known to said defendant.

That the defendant Traveler's Indemnity Company was and is, at all times, authorized to do business in the State of Idaho and licensed to write fidelity and surety business, health and accident, all classes of liability above referred to, plate glass, boiler machinery, burglary, sprinkler, team and vehicle and miscellaneous insurance as classified and described by the laws of the State of Idaho but the plaintiff is unable to state more specific, or give a more definite description of what said company is authorized to write and the same cannot be given by the plaintiff but is know to the defendants.

That the plaintiff is unable to state just what specific kind of insurance are written by each of the defendants, or just what relation exists between the two defendants, but plaintiff alleges that said Travelers Insurance Company owns the Travelers Indemnity Company and that said companies have some arrangement of which the plaintiff cannot give a more definite description whereby the premiums collected from policy holders of Idaho business are pro-rated or divided in some manner in said company and that they are operating under a system whereby the business is jointly conducted and operated substantially as one business. The plaintiff cannot state more definitely than is stated in this complaint what premiums on the business referred to in this complaint as written or [6] countersigned by the plaintiff were collected or went to either of said defendants individually, but allege that all of the premiums on all of the business or policies countersigned by the plaintiff were owed by and paid to the defendant companies and said defendant companies and each and all of them under the allegations herein set forth are indebted to the plaintiff for the commissions as provided in the above mentioned contract, referred to as Exhibit "A."

VI.

Plaintiff alleges that according to his information and belief the defendant, Traveler's Insurance Company, wrote all of the workmen's compensation, occupational disease, employer's liability insurance, auto liability and comprehensive liability

and that under the arrangements and contracts set forth under the laws of the State of Idaho, and on or about the 24th day of May, 1942, the defendants submitted to the plaintiff at Coeur d'Alene, Idaho by mail for the counter-signature, three policies of insurance, a more definite description of which cannot to be set forth than is given, except that the plaintiff informed and believes and therefore alleges that the Travelers Insurance Company, under the arrangement existing between said companies relative to the division of the premium, a more definite description of which cannot be given by the plaintiff, were entitled to and collected the premiums on said policies and said policies were submitted to the plaintiff for countersigning as resident agent and no copy of said policies were submitted to the plaintiff, or left with him and the plaintiff has not a copy of said policy, or any of the policies mentioned and cannot give a more definite description of said policy than is herein set forth, but that the defendants have said copies and all thereof in their possession and know the content and the exact amount thereof and all the terms and conditions thereof.

VII.

That among the policies submitted on or about the 25th day of May, 1942, was a policy of the Travelers Insurance Company W.U.B. No. 863386 [7] insuring Walter Butler Company, a contractor building the Farragut Naval Station at or near Bayview within the State of Idaho, and that said policy included all sub-contractors of said Walter Butler Company and said Walter Butler Company from

the 28th day of April, 1942 to the 28th day of April 1944; that said policy provided that the policy holder was insured against the operations as set forth in said policy; that the plaintiff cannot state just what the said operations were except that said policy did cover the employer's liability within the State of Idaho for workmen's compensation insurance, occupational disease insurance and employer's liability insurance; that said policy provided a loss constant under code 0023 of \$5.00 and an expense constant under code 0020 of \$10.00; that the estimated premium for the compensation insurance was \$295,265.00 and that the estimated premium of the occupational disease was \$1,520.00 and that the deposit premium made by the contractor under said policy at the time of writing of said policy was \$44,517.75.

That among policies so submitted was policy W. S.L.A.863388 of the Travelers Insurance Company insuring Walter Butler Company, contractor, and all sub-contractors, as described in an endorsment to said policy against certain auto liability including public liability and property damage; that the deposit premium for said public liability was \$60.99 and the deposit premium for the property damage was \$30.38 and that said policy was designated a comprehensive auto liability policy, a more definite description of which cannot be given by the plaintiff, but said policy is in the possession of said defendants and they have the information and know the description thereof and all questions in regard thereto.

VIII.

That among the policies so submitted to said plaintiff for countersigning was W.S.L.G. 843387 of the Travelers Insurance Company, insuring said Walter Butler Company against comprehensive general liability in the amount of \$50,000 involving one person in any accident [8] and \$100,000 involving more than one person in any one accident, and that the estimated premium was \$19,403.62 and the deposit premium was \$2,910.54. That upon the receipt of said policies and each of them from said defendant companies, the plaintiff acted as their resident agent under the laws of the State of Idaho, and in accordance with the laws of the State of Idaho and in accordance with the instructions received from the defendant, countersigned the policies, the original or original copies of which said policies the defendants have in their possession and said policies and all thereof were returned to the defendants by the plaintiff and that the plaintiff kept no copy thereof and does not have the same now and cannot set out said policy in full.

That with the said three policies of insurance above mentioned there was submitted a bond written by the defendant Travelers Indemnity Company for counter signing by the plaintiff as resident agent, and under instructions from said defendant, and particularly the Travelers Indemnity Company, a copy of which instructions the defendants have in their possession, the bond was countersigned by the plaintiff as resident agent, and mailed by the plaintiff at the instance and request of said defendants

and filed with the Industrial Accident Board of the State of Idaho and that said bond was issued by said defendant the Travelers Indemnity Company concurrently with the above named policies and was written by said defendant, the Travelers Indemnity Company as surety and the Walter Butler Company as principal and that said bond was issued necessarily for the purpose of securing the full discharge of the Walter Butler Company's obligation for compensation or other benefits under the laws of the State of Idaho, which obligations were assumed under said policies so written, and was in fact a part of the insurance covered by said policies and that said policy of insurance above mentioned and said bond remained in full force and effect up until the 28th day of April, 1943, when said policies and bond were renewed for another year by said defendant companies, said bond was renewed and continued and kept in force for another year by the said defendants and [9] by the plaintiff countersigning as resident agent a renewal certificate, which certificate was submitted to the plaintiff by the defendant companies and filed by the plaintiff at the request of the defendant companies with the Industrial Accident Board of the State of Idaho. The plaintiff does not have a copy of said renewal certificates, bonds or policies and does not know the contents thereof except as herein stated, but the defendant companies do have copies of all said policies, bonds and renewal certificates, a copy of which said renewal certificate is hereto attached marked Exhibit "C" and made a

part hereof as fully as if written herein, and the plaintiff has no means of knowing more definitely as set forth the amount of premiums collected and earned under any and all policies and bond, but the plaintiff alleges that under said policy W.U.B. 863386 the premiums so earned and collected were in excess of \$900,000.00 and that the premiums under the other policies were in excess of the amounts estimated therein, but the plaintiff cannot give a definite statement of said premiums so collected and earned and asks that the defendants be required to disclose to the Court and to the plaintiff, the amount of premiums collected under the various classifications of each and all of the policies and bond above described and mentioned, the amount of said premiums depending on the actual amount of pay roll and the defendants ascertained from time to time by investigation of the Walter Butler Company's records, which information the defendants have and which the plaintiff does not have.

Plaintiff further alleges that on or about the 26th day of February, there was submitted to him as countersigning resident agent of said companies, for signature, a policy of said company designated H.S.P. 908557 to said Walter Butler Company covering the public liability of the property described as that of the Bozanta Tavern and certain other buildings located at or near Hayden Lake in Kootenai County, Idaho; that the plaintiff cannot give a more definite description of the policy which was signed by him and returned to said companies and cannot state the amount of the premiums collected

or [10] earned under said policy but that said policy was countersigned by the plaintiff under the same authority as the other policies first mentioned in this complaint and that the defendants have said policy in their possession and know all of said facts.

That on or about the 25th day of February, 1943, there was also submitted to the plaintiff by the defendants for countersignature as agent the original of a policy marked U.B. 908556, which the plaintiff believes covers the compensation insurance on the employees of the Walter Butler Company operating the Bozanta Tavern and Hotel and the business in connection therewith. That the plaintiff was not furnished and does not have a copy of either of the last two mentioned policies and cannot give a more definite description of the policy or policies or premiums earned or codes and classifications contained in said policies as are herein set forth, but the defendants have all of said information in their possession.

IX.

Plaintiff alleges and believes that the estimated premiums on said compensation policy last mentioned amounted to \$216.00 and that all of the premiums of the policies herein mentioned were paid direct by the said Walter Butler Company to the said defendants and the plaintiff has no means of knowing when the premiums were paid or collected or the amount of the premiums so earned and collected; and the estimated payroll account of said Walter Butler Company and various other information which the defendants themselves secured and

have and therefore the defendants have within their possession all of said information and know the amounts of all premiums earned and collected on all of the above described policies and plaintiff alleges that he is entitled to the full commission as provided for in Exhibit "A" of the premiums earned and collected on all of the above described policies and that no part of said commissions have been paid to the plaintiff whatever by the defendants, or either of them, or by any one on their behalf and it is necessary that the defendants be made to divulge to [11] the plaintiff, and to the Court the amount of premiums earned and collected under all of the various classifications of all of the above policies and plaintiff alleges that the insurance written by said defendants as above described on all of the policies above mentioned were written on persons and property within the State of Idaho and were made, written, placed or caused to be made, written or placed in this State on property and persons situated and located in the State of Idaho and that said policies, as the plaintiff is informed and believes were issued to the Walter Butler Company, which the plaintiff is informed and believes was organized and existing under the laws of the State of Minnesota.

That the plaintiff has no definite description of said policies then that given, except that the Walter Butler Company referred to was the General Contractor who built the Naval Base known as Farragut Naval Station, Kootenai County, Idaho, and that the plaintiff has no more definite knowl-

edge as to just who prepared said policies for the defendant companies, but alleges that all of the policies were written by the Company direct to the Walter Butler Company and were written and placed with the Walter Butler Company and that the plaintiff acted as countersigning agent direct and not through any licensed broker.

That the plaintiff does not know, or has no way of knowing the exact amount of the premiums earned and collected by the defendants by reason of said policies, but alleges that he is entitled to at least 10% commission thereon and that said sum amounts to, and is in excess of \$90,000.

Wherefore, the plaintiff prays judgment against said defendants.

I.

That an order may be made by the Court requiring the defendants and each of them to divulge to the Court and to this plaintiff the amount of premiums earned and collected under all of the various classifications and under all of the policies set forth and described herein [12] and all of the insurance written by the defendants as above described and that upon said information being furnished that the plaintiff have judgment against the defendants, and each of them in a sum equal to the commissions as provided for in Exhibit "A," on all of the premiums earned and collected by the defendants by reason of said policies and plaintiff alleges that said sum amounts to and is in excess of the sum of \$90,000 with interest thereon at the rate of 6% per annum, from the date when said commission be-

came due, together with plaintiff's costs and disbursements herein expended.

EZRA R. WHITLA,
E. T. KNUDSON,
WHITLA & KNUDSON,
Attorneys for Plaintiff.

State of Idaho,
County of Kootenai—ss.

Eugene H. Ware, being first duly sworn, on oath, deposes and says; I am the above named plaintiff, that I have read the above and foregoing complaint, know the contents thereof and verily believe the facts therein stated to be true.

EUGENE H. WARE,

Subscribed and sworn to before me this 26th day of February, A.D., 1944.

[Seal] EVELYN M. THOMAS,
Notary Public for the State of Idaho, residing at
Coeur d'Alene. My Commission expires
3/19/45. [13]

EXHIBIT "A"

The Travelers Insurance Company—The Travelers Indemnity Company, both of Hartford, Connecticut, hereinafter called the Company, and Eugene H. Ware Company of Coeur d'Alene, Idaho, hereinafter called the Agent, for the considerations hereinafter expressed, agree together as follows:

1. The territory within which the Agent may act shall be the following: Coeur d'Alene and Vicinity, Idaho.

2. This contract shall become effective on the 1st day of October, 1936, and the services of the Agent shall begin on that date.

3. The Agent agrees to transact all business for the Company in accordance with its rules and instructions now in force or hereafter issued; to promptly collect and account for all premiums; and to promptly forward proposals and report his collections to the Company's Branch office at Seattle, Washington.

4. During the continuance of this contract the Company will pay on premiums reported and paid, on policies issued effective on and after the date on which this contract shall become effective on proposals secured by or through the agent, as full compensation for all services and full reimbursement for all expenditures, commissions as follows:

PART I.

On Workmen's Compensation and Employers' Liability Premiums, except Underground Coal Mining Risks.....	10	Per Cent
On Workmen's Compensation and Employers' Liability Premiums on Underground Coal Mining Risks.....	5	Per Cent
On all other forms of Liability Premiums, except Automobile Liability Premiums upon Public Passenger Carrying Risks....	17½	Per Cent
On Automobile Liability Premiums upon Public Passenger Carrying Risks	10	Per Cent

Part II

On all forms of Burglary Insurance Premiums.....	20	Per Cent
On all forms of Plate Glass Insurance Premiums.....	22½	Per Cent
On all forms of Steam Boiler, Engine, Flywheel, Machinery and Electrical Equipment Premiums.....	17½	Per Cent
On Automobile Property Damage and Collision Premiums, except Property Damage Premiums upon Public Passenger Carrying Automobile Risks	20	Per Cent

e. On Property Damage Premiums upon Public Passenger Carrying Automobile Risks.....	10 Per Cent
f. On Property Damage and Collision Premiums other than Automobile	17½ Per Cent

°An additional allowance of 2½% will be granted to the Agent for adjustment of claims and making inspections of Plate Glass when these services are actually performed.

5. The Agent shall also be entitled to the above mentioned commission upon additional premiums upon risks written or renewed by him during the continuance of this contract, which shall become due and are paid to the Company, provided that commissions thereon shall not have been paid to, or shall not be due to any other person, but the Agent shall not be entitled to any commission upon additional premiums upon any risk not written by him. If the Company shall return to any insured premiums for any period, the Agent shall repay to the Company the commission on the portion of the premiums so returned theretofore paid to or deducted by the Agent upon such risk.

6. All moneys and other property collected or received by the Agent for or on behalf of the Company shall be held in a fiduciary capacity and shall not be used by him for any purpose whatsoever except as herein specifically authorized, but shall be delivered as soon as possible to the Company or to the Cashier at the Branch Office to which the Agent reports or, upon demand, to its Manager or other authorized representative of the Company.

7. The Agent shall be responsible for all risks placed on the books of the Company through his agency by any sub-agents or brokers together with

all premiums or moneys collected by them in connection with such risks.

8. The Agent is authorized to countersign Policies of Insurance, Renewal Receipts, Certificates, and Endorsements pertaining to the lines of insurance covered by this contract, unless otherwise advised.

9. The Agent shall also render statements, and deliver over moneys, vouchers, policies, renewal receipts, and other property of the Company at any time when requested by an authorized representative of the Company, and shall at all times conform to and comply with the manual rules and other instructions of the Company in relation to its business. [15]

10. All accounts, vouchers, and records and all other documents and all correspondence pertaining to the Company's business shall at all times be open to examination by its Manager or other authorized representative.

11. The Agent has no authority to make, alter, vary or discharge any contract; or to extend the time for payment of premiums; or to waive or extend any obligation or condition; or to incur any liability in behalf of the Company; or to receive any money due or to become due to the Company, except on policies, renewal receipts, and additional premium statements sent to him for collection.

12. If the Agent shall neglect to report and pay over premiums collected by him as directed or shall otherwise violate any of the provisions hereof, all of his rights under this contract, including the right

to commissions on all premiums payable thereafter, shall thereby forthwith terminate.

13. The Agent further agrees that he will conform to, and adhere strictly to the Rules concerning Acquisition Cost and Field Supervision Cost for Casualty Insurance Companies and Agents approved by the National Convention of Insurance Commissioners December 7, 1922, in so far as they apply to him.

14. If the Company shall discontinue business in the territory in which the Agent is authorized to act, this contract shall cease at once upon notice to the Agent of such discontinuance, and the Agent shall have no claim on it thereafter for any charges or services or for any damages on account of such discontinuance.

15. The Agent shall not insert any advertisement respecting this Company in any publication without the written authority of the Company first obtained, nor shall he offer or pay rebates of premium on any line of insurance covered by this contract.

16. All former contracts between the Agent and the Travelers Insurance Company or the Travelers Indemnity Company relating to lines of insurance covered by this contract, together with all supplements thereto, if any are [16] hereby canceled, and the Agent shall hereafter act for the Company in said lines of insurance under this contract only.

17. If this contract shall be terminated by either party for any cause whatever, the remuneration which shall then have been paid to the Agent, together with the amount then due him under this

contract, shall be in full settlement of all claims and demands upon the Company in favor of the Agent under this contract, and all further remuneration which a continuance of said contract might have secured to him shall be waived and forfeited.

18. Either party to this contract may terminate the same by giving to the other party notice in writing to that effect, and the power of the Agent to collect and receive premiums shall end with the termination of this contract.

In witness whereof, The Travelers Insurance Company and The Travelers Indemnity Company have caused these presents to be signed at the Home Office and the Agent has subscribed his name hereto this 1st day of October, 1936.

THE TRAVELERS
INSURANCE COMPANY,
THE TRAVELERS
INDEMNITY COMPANY,

/s/ L. E. ZACHER.

Agent.

/s/ WALTER E. MALLORY,

Agent Secretary.

/s/ WARREN G. WILLSEY,

Asst. Registrar, Agency Dept.

EUGENE H. WARE COMPANY,

/s/ EUGENE H. WARE, Pres.,

Nominated by

/s/ WILLIAM P. SIZEMORE,

Manager. [17]

EXHIBIT A-1

The Travelers

The Travelers Insurance Company

The Travelers Indemnity Company

The Travelers Fire Insurance Company

L. Edmund Zacher, President

Hartford, Connecticut

Agency Department

Walter E. Mallory, Agency Secretary.

October 1, 1936.

Eugene H. Ware Company, Agent.

Coeur d'Alene, Idaho.

Gentlemen:

Having been appointed an Agent of The Travelers under Casualty contract and licensed with The Travelers Fire Insurance Company for Automobile Fire and Theft lines, you are hereby authorized to countersign policies of Insurance, Certificates and Endorsements pertaining to such lines so long as you remain a Casualty contract Agent and during the continuance of your Fire license.

Yours very truly,

/s/ WALTER E. MALLORY,
Agency Secretary. [18]

EXHIBIT "A-2"

The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.
To: All Agents, Casualty Lines.
Subject: Commissions.

City or Town.

June 1, 1940.

You are hereby informed that until otherwise advised, on risks written on a Retrospective or Special Commission basis, on risks or portions of risks which are in states other than that indicated in the territory described in your Agency Agreement, and on Bonds involving execution or countersignature by another Agent (provided your Agency Agreement includes Surety Lines), the commissions which you may retain out of premiums paid to the Company will be fixed on the basis of the individual risk, anything in your Agency Agreement to the contrary notwithstanding.

Please attach this letter to your Agency Agreement, Casualty Lines, of which it forms a part.

/s/ WALTER E. MALLORY,
Agency Secretary. [19]

EXHIBIT A-3

The Travelers
Hartford Connecticut

From: Walter E. Mallory, Agency Secretary.
To: All Agents, Casualty Lines.
Subject: Commissions on Automobile Medical Payments Premiums.

City or Town.

September 20, 1939.

You are hereby informed that until otherwise advised, you may retain out of premiums paid to the Company on Automobile Medical Payments coverage the same commission as at present provided under your Agency Agreement, Casualty Lines, on Automobile Liability premiums other than Safe Driver Reward risks.

Please attach this letter to your Agency Agreement of which it forms a part.

/s/ WALTER E. MALLORY,
Agency Secretary. [20]

EXHIBIT A-4

The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.
To: General Agents, Regional Agents and
Agents, Casualty Lines, U.S.A.
Subject: Commissions on Automobile Premiums.

City or Town.
February 23, 1938.

In order to conform with further Ruling of the Conference on Acquisition and Field Supervision Cost for Casualty Insurance, you are hereby informed that until otherwise advised, on any policies of Automobile Liability (Bodily Injury) and Property Damage insurance on Private Passenger Cars issued on a specified car basis in any state where the "Safe Driver Reward Plan" is in effect, which policies both new and renewal are issued to become effective on and after February 1, 1938, you will be allowed to retain out of premiums paid to the Company the same commission as would be paid if such policy were issued under the "Safe Driver Reward Plan," anything in your Casualty Agency Agreement or any supplements, amendments, or riders thereto to the contrary notwithstanding.

In all other respects your said Agency Agreement remains unchanged.

/s/ WALTER E. MALLORY,
Agency Secretary. [21]

EXHIBIT A-5

The Travelers

Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.

To: Agents, Casualty Lines, U.S.A.

Subject: Commissions on Automobile Premiums.

City or Town.

January 27, 1938.

In order to conform with the rules and requirements of the Conference on Acquisition and Field Supervision Cost for Casualty Insurance, you are hereby informed that until otherwise advised, on policies of Automobile Liability (Bodily Injury) and Property Damage insurance on Private Passenger Cars issued under the "Safe Driver Reward Plan" and, in any states where the "Safe Driver Reward Plan" is in effect, on policies of Automobile Liability (Bodily Injury) insurance when written separately from Property Damage insurance and on the specified car basis at the regular manual rates, which policies both new and renewal are issued to become effective on and after February 1, 1938, you will be allowed to retain out of premiums paid to the Company a commission of 15% in lieu of the rate of commission stated in your Casualty Agency Agreement or supplements thereto on Automobile Liability and Property Damage premiums on Private Passenger Cars.

In all other respects your said Agency Agreement remains unchanged.

Please attach this letter to your Casualty Agency Agreement of which it forms a part.

/s/ WALTER E. MALLORY,

Agency Secretary. [22]

EXHIBIT A-6
The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.
To: Regional Agents and Agents—Casualty
Lines.
Subject: Commissions on Burglary Premiums—Securities Insurance covering on the Premises of the Assured or in the Custody of Outside Messengers.

City or Town.
March 1, 1937.

In order to conform with the recently amended rules of the Conference on Acquisition and Field Supervision Cost for Casualty Insurance you are hereby informed that until otherwise advised you will be allowed, on premiums paid to the Company, for Securities Insurance covering on the Premises of the Assured or in the Custody of Outside Messengers on policies both new and renewal written to become effective on and after February 15, 1937, a commission of 10% in lieu of the rate of commission or any Field Supervision Allowance stated in your contract or supplements thereto on Burglary premiums as previously allowed on such risks.

In all other respects your said contract remains unchanged.

Please attach this letter to your agency contract of which it forms a part.

/s/ WALTER E. MALLORY,
Agency Secretary. [23]

EXHIBIT A-7

The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.
To: Agents—Casualty Lines.
Subject: Premier Residence Policy.

City or Town.
March 10, 1931.

Supplementing your contract with The Travelers Companies, Casualty lines, you are hereby informed that until further notice and subject to the terms of your contract you will be allowed a commission of 20% on the premiums of the above form of policy, both new and renewal, which premiums are reported and paid by you to the Company.

In all other respects your said contract remains unchanged.

Yours very truly,

/s/ WALTER E. MALLORY,
Agency Secretary. [24]

EXHIBIT A-8

The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.
To: Regional Agents and Agents—Casualty
Lines.
Subject: Commissions on Burglary Premiums—Securities Insurance Covering on the Premises of the Assured.

City or Town.

July 15, 1936.

In order to conform with the recently amended rules of the Conference on Acquisition and Field Supervision Cost for Casualty Insurance you are hereby informed that until otherwise advised you will be allowed on premiums paid to the Company for Securities Insurance Covering on the Premises of the Assured on policies both new and renewal written to become effective on and after August 1, 1936, a commission of 10% in lieu of the rate of commission or any Field Supervision Allowance stated in your contract or supplements thereto on Burglary premiums as previously allowed on such risks.

In all other respects your said contract remains unchanged.

Please attach this letter to your agency contract of which it forms a part.

/s/ WALTER E. MALLORY,
Agency Secretary. [25]

EXHIBIT A-9.

The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency.
To: Regional Agents and Agents, Casualty
Lines.
Subject: Commissions on Liability and Property
Damage Premiums on Long Haul Truck-
man Risks.

City or Town.

January 25, 1936.

In order to conform with the recently amended rules and requirements of the Conference on Acquisition and Field Supervision Cost for Casualty Insurance you are hereby informed that until otherwise advised you will be allowed on the premiums on Liability and Property Damage Insurance covering Long Haul Truckman Risks, as defined in the Automobile Manual, on policies both new and renewal written to become effective on and after December 31, 1935, which premiums are paid to the Company, a commission of 10% instead of the rates of commission stated in your contract or supplements thereto applicable to Automobile Risks.

The foregoing shall in no way modify the rates of commission payable on premiums covering Bodily Injury Liability representing Statutory Coverage under the Massachusetts Compulsory Automobile Liability Security Act which commissions remain unchanged.

Please attach this letter to your agency contract of which it forms a part.

/s/ WALTER E. MALLORY,
Agency Secretary. [26]

EXHIBIT "B"

The Travelers Indemnity Company
Hartford, Connecticut

Power of Attorney

Know All Men By These Presents:

That The Travelers Indemnity Company, a corporation of the State of Connecticut, does hereby make, constitute and appoint

E. H. Ware, James Barrett and Evelyn Thomas, all of Coeur d'Alene, Idaho, Each

its true and lawful Attorney(s)-in-Fact, with full power and authority, for and on behalf of the Company as surety, to execute and deliver and affix the seal of the Company thereto, if a seal is required, bonds, undertakings, recognizances or other written obligations in the nature thereof, as follows:

Any and all bonds, undertakings, recognizances or other written obligations in the nature thereof not exceeding in amount One Hundred Thousand Dollars (\$100,000) in any single instance

and to bind The Travelers Indemnity Company thereby, and all of the acts of said Attorney(s)-in-

Fact, pursuant to these presents, are hereby ratified and confirmed.

This appointment is made under and by authority of the following by-laws of the Company which by-laws are now in full force and effect:

Section 8. The President, any Vice-President, and Secretary or any Department Secretary may appoint attorneys-in-fact or agents with power and authority, as defined or limited in their respective powers of attorney, for and on behalf of the Company to execute and deliver, and affix the seal of the Company thereto, bonds, undertakings, recognizances or other written obligations in the nature thereof and any of said officers may remove any such attorney-in-fact or agent and revoke the power and authority given to him.

Section 10. Any bond, undertaking, recognizance or written obligation in the nature thereof shall be valid and binding upon the Company when signed by the President or any Vice-President and duly attested and sealed if a seal is required, by any Secretary or any Department Secretary or any Assistant-Secretary, or when signed by the President or any Vice-President and countersigned and sealed, if a seal is required, by a duly authorized attorney-in-fact or agent; and any such bond, undertaking, recognizance or written obligation in the nature thereof shall be valid and binding upon the Company when duly executed and sealed,

if a seal is required, by one or more attorneys-in-fact or agents pursuant to and within the limits of the authority granted by his or their power or powers of attorney.

In witness whereof, The Travelers Indemnity Company has caused these presents to be signed by its proper officer and its corporate seal to be hereunto affixed this 5th day of December, 1940.

THE TRAVELERS
INDEMNITY COMPANY,
By J. C. SMITH,
Secretary. [27]

State of Connecticut,
County of Hartford—ss.

On this 5th day of December in the year 1940 before me personally came J. C. Smith to me known, who, being by me duly sworn, did depose and say: that he resides in the State of Connecticut; that he is Secretary of The Travelers Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of his office under the by-laws of said corporation, and that he signed his name thereto by like authority.

ROBERT FERGUSON, JR.,
Notary Public.

State of Connecticut,
County of Hartford—ss.

I, F. P. Hayden, Assistant Secretary of The Travelers Indemnity Company, a corporation of the State of Connecticut, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said Company, which is still in full force and effect.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of Hartford, this 5th day of December, 1940.

F. P. HAYDEN,

Assistant Secretary. [28]

EXHIBIT "C"

The Travelers Indemnity Company
Hartford, Connecticut
(A Stock Company)

Idaho Compensation Surety Bond No. 28730 executed May 14, 1942 on behalf of Walter Butler Incorporated, of Pend d'Oreille, Idaho in favor of the State of Idaho, is hereby continued in force for the period beginning April 28, 1943, and ending April 28, 1944, subject to all the covenants and conditions of the said original bond to the same extent if said covenants and conditions were incorporated herein.

In Witness Whereof, The Travelers Indemnity Company has caused these presents to be executed

and its corporate seal attached this 8th day of March, 1943.

THE TRAVELERS

INDEMNITY COMPANY

By R. H. WADSWORTH,
Attorney-in-Fact.

By V. J. DUFFY,
Attorney-in-Fact.

Countersigned at Coeur d'Alene, Idaho.

EUGENE H. WARE CO.

By E. H. WARE
Resident Agent.

Continuation Certificate for Idaho Compensation
Surety Bond.

S-667

#963

[Title of District Court and Cause.]

ANSWER

Come Now the defendants and in answer to the
complaint state:

First Defense

The complaint fails to state a claim against the
defendants or either of them upon which relief can
be claimed.

Second Defense

1. Defendants deny each and every allegation
contained in the complaint except as hereinafter
admitted.

2. With respect to Paragraph I of the complaint, defendants admit that the plaintiff Eugene H. Ware was a citizen and resident of Coeur d'Alene, Kootenai County, Idaho, and the defendants Travelers Insurance Company and Travelers Indemnity Company, and each of them, were and still are corporations organized and existing under and by virtue of the laws of the state of Connecticut and doing business in the State of Idaho. Defendants deny each and every other allegation therein contained.

3. With respect to Paragraph II of the Complaint, defendants admit that the plaintiff, Eugene H. Ware, also known as E. H. Ware, [30] since January 1, 1936, and during his lifetime was a duly qualified and licensed insurance agent according to the laws of the State of Idaho, residing in Coeur d'Alene, Kootenai County, Idaho. That said Eugene H. Ware, or E. H. Ware, also did business as Eugene H. Ware Co., and the defendants caused the said Eugene H. Ware to be duly licensed as their resident agent in the State of Idaho and caused a certificate of said appointment to be made and delivered to the said Eugene H. Ware. Defendants deny each and every other allegation therein contained.

4. With respect to Paragraph III of the complaint, defendants admit that on or about the first day of October, 1936, Eugene H. Ware entered into a written contract with the defendants, and each of them, as set forth in Exhibits A and A-1 and that such contract was amended subsequently as stated in Exhibits A-2, A-3, A-4, A-5, A-6, A-7, A-8, and

A-9, but deny each and every other allegation therein contained except in this answer hereinafter admitted.

5. With respect to Paragraph IV of the complaint, defendants admit the allegations therein contained.

6. With respect to Paragraph V of the complaint, defendants admit that The Travelers Insurance Company and The Travelers Indemnity Company are corporations owned, managed and controlled by the same persons and that they, with other companies, constitute what is generally known as The Travelers line writing various kinds of insurance and said business is done largely through the same agents. That The Travelers Insurance Company was and is licensed to do business in the State of Idaho and to write various types of insurance not including automobile property damage, or any other property damage liability insurance; that the defendant The Travelers Indemnity Company was and is at all times authorized to do business in the State of Idaho and licensed to write the various types of insurance alleged. Defendants deny each and every other allegation therein contained.

7. With respect to paragraph VI of the complaint, defendants admit that The Travelers Insurance Company wrote the Workmen's Compensation and Employers' Liability insurance, the Employers' Liability coverage for Occupational Disease, the Automobile Bodily Injury Liability and the Comprehensive Bodily Injury Liability afforded in three policies of insurance more specifically described in

Paragraphs VII and VIII of the complaint and that said policies were issued as alleged in Paragraph VII of the complaint to Walter Butler Company, a contractor, who built the Farragut Naval Training Station at or near Bayview within the State of Idaho, and was entitled to and collected the premiums for such coverages on said policies; that on or about May 24, 1942, the aforesaid three policies of insurance were by mail submitted to Eugene H. Ware at Coeur d'Alene, Idaho, for countersignature; defendants further admit that no copies of the aforesaid three policies of insurance were submitted to the plaintiff or were left with him; defendants further admit that they know the contents of said policies and all of their terms and conditions. Defendants deny each and every other allegation therein contained.

8. With respect to Paragraph VII of the complaint, defendants admit that among the policies submitted on or about May 25, 1942, was a policy of The Travelers Insurance Company W.U.B. #863386 insuring Walter Butler Company, a contractor building the Farragut Naval Station at or near Bayview within the State of Idaho; that said policy provided that the policyholder was insured against the operations as set forth in said policy and covered the employer's [32] liability within the State of Idaho for Workmen's Compensation Insurance, occupational disease insurance, and employer's liability insurance; that said policy provided a loss constant under Code 0023 of \$5.00 and an expense constant under Code 0020 of \$10.00;

that the estimated premium for the compensation insurance was \$295,265.00 and the estimated premium of the occupational disease was \$1,520.00 and that the deposit premium made by said contractor under said policy at the time of writing of said policy was \$44,517.75; that also submitted for countersignature was policy W.S.L.A. 863388, the defendant insurers named therein insuring against certain auto liability including public liability and property damage; that the deposit premium for said public liability was \$60.99 and the deposit premium for the property damage was \$30.38; that said policy was designated a comprehensive auto liability policy; that the defendants know the description thereof and have information with respect thereto. Defendants deny each and every other allegation therein contained.

9. With respect to Paragraph VIII of the complaint, defendants admit that policy WSLG-863387 of The Travelers Insurance Company insured said Walter Butler Company against comprehensive general liability in the amount of \$50,000 involving one person in any accident, and \$100,000 involving more than one person in any one accident; that the estimated premium was \$19,403.62 and the deposit premium was \$2,910.54. That Eugene H. Ware countersigned said policy and returned it to the defendants. That defendants further admit that a surety bond covering the liability for workman's compensation and occupational disease compensation was written by the Travelers Indemnity Company concurrently with the three said policies

of insurance with the Travelers Indemnity Company as surety and the Walter Butler Company as principal for the period of one year commencing April 28, 1942; that said bond was submitted with the said [33] three policies of insurance above mentioned for countersigning by Eugene H. Ware; that said bond was countersigned by Eugene H. Ware and was filed with the Industrial Accident Board of the State of Idaho; that said bond was issued for the purpose of securing the full discharge of the said Walter Butler Company's obligations for compensation or other benefits under the laws of the State of Idaho and that said bond was renewed for the period of another year by a renewal certificate and that said certificate was submitted to Eugene H. Ware by The Travelers Indemnity Company for countersignature and was filed by the said Eugene H. Ware with said Industrial Accident Board. Defendants further admit that the obligation of the said Walter Butler Company for compensation or other benefits under the laws of the State of Idaho arising out of the building of the said Farragut Naval Training Station was assumed under compensation policy WUB-863386 of The Travelers Insurance Company. Defendants further admit that the actual amount of pay roll of the Walter Butler Company and certain subcontractors of the Walter Butler Company were used as a basis for computing one element of the premium under said policies. The defendants further admit that liability policy H.P.S. 908557, naming The Travelers Insurance Company as the insurer with respect to bodily in-

jury liability and naming The Travelers Indemnity Insurance Company as insurer with respect to property damage liability, was submitted to Eugene H. Ware in February, 1943, for countersignature and that said policy was issued to the Walter Butler Company covering certain liability in connection with the Bozanta Tavern located at or near Hayden Lake, Idaho; that said policy was countersigned by Eugene H. Ware and was returned to the defendants. Defendants further admit that the workmen's compensation and employers' liability U.B. 908556, naming [34] The Travelers Insurance Company as insurer, was submitted to Eugene H. Ware in February, 1943. That the earned premium under policy HPS-908557 was as follows: The Travelers Insurance Company \$11.10, The Travelers Indemnity Company \$3.43; that the earned premium on policy UB-908556 earned by the Travelers Insurance Company was \$99.45. Defendants deny each and every other allegation therein contained.

10. With respect to Paragraph IX of the complaint, defendants admit that the estimated insurance premium on policy U.B. 908556 was \$216.00; they admit that all the premiums for policy WUB-863386, WSLG-863387, and WSLA-863388 were paid direct by the said Walter Butler Company to the defendants; admit that they have in their possession information and knowledge as to all premiums earned and collected on all of the above described policies; admit that no commissions have been paid to Eugene H. Ware by the defendants, or either of them, or by anyone in their behalf; that

the sole payment made to said Eugene H. Ware was the payment as hereinafter in the Fourth Defense alleged; admit that Walter Butler Company was organized and exists under the Laws of the State of Minnesota; admit that policies WUB-863386, WSLG-863387, WSLA-863388, and policies H.P.S. 908557 and U.B.-908556 describe Walter Butler Company as an insured; that Walter Butler was the general contractor who built the naval base known as Farragut Naval Station, Kootenai County, Idaho; that the first three said policies were written by the company direct to the Walter Butler Company and were written and placed with the Walter Butler Company and that Eugene H. Ware acted as countersigning agent direct and not through any licensed broker. Defendants deny each and every other allegation therein contained. [35]

Third Defense

That Walter Butler Company is and at all times herein mentioned was a corporation organized under and pursuant to the laws of Minnesota. That prior to the issuance of the insurance policies described in the complaint said Walter Butler Company entered into a cost-plus-a-fixed-fee contract with the United States Navy (the performance of which was under the jurisdiction of the Bureau of Yards and Docks of the United States Navy), for the construction of the Farragut Naval Station at or near Bayview within the State of Idaho. That in connection with said contract the Bureau of Yards and Docks of the United States Navy required the hereinafter

described insurance coverage, the cost of such coverage to be paid for under the terms of the aforesaid cost-plus-a-fixed-fee contract by the United States Navy; that said insurance coverage so required was coverage to be issued under what the said Bureau of Yards and Docks originally designated under the name of "Comprehensive Insurance Rating Plan for National Defense Projects" and later designated as "War Projects Insurance Rating Plan." By the terms of the aforesaid Plan, insurance of specified character was required to be issued on a retrospective insurance premium basis that would reflect only the following items of cost:

- (a) A fixed charge to meet the administrative cost of the insurance carrier exclusive of claim administrative cost and to meet losses in excess of the maximum premium.
- (b) Losses incurred.
- (c) A charge of 12% of the losses to take care of administrative claim requirements other than "allocated claim expenses," [36]
- (d) Allocated claim expenses.
- (e) State taxes payable by the insurance carrier on such premiums.

The premiums so determined were in all instances subject to a maximum premium. The maximum premium and the fixed charge premium were percentages of the standard premiums developed under the insurance policies in accordance with their terms exclusive of the Comprehensive Insurance Rating Plan endorsement.

That the aforesaid Plan made provision for the selection and use by a contractor of an insurance advisor and for the payment by the contractor, and only by the contractor for the services of such advisor. That said Plan expressly prohibited the insurance carrier from paying anything whatsoever to such insurance advisor for services rendered by him; that the aforesaid plan did not contemplate and provision was not made therein for the payment of commission to an agent or broker by the insurance carrier. That by the terms of the aforesaid Plan the Comprehensive Insurance Rating Plan Endorsement was issued and formed a part of insurance policies issued under such Plan.

That pursuant to the aforesaid Comprehensive Insurance Rating Plan said Walter Butler Company caused to be made, written and placed in the State of New York through Acme Brokerage Corporation, the insurance advisor of Walter Butler Company, the following insurance policies:

Policy WUB-863386 being standard workmen's compensation and employers' liability policy issued by the Travelers Insurance Company; policy WSLG-863387 being comprehensive general liability policy issued by The Travelers Insurance Company, and policy WSLA-863388, being comprehensive automobile liability policy issued by The Travelers Insurance Company and The Travelers Indemnity Company. That the aforesaid policy WSLG-863387 is a severally issued policy which carries the name of both The Travelers Insurance Company and The Travelers Indemnity Company. However, The

Travelers Insurance Company was the only insurer with respect to the coverage afforded under said policy WSLG-863387. The policy WSLA-863388 is also a severally issued policy carrying the names both of The Travelers Insurance Company and The Travelers Indemnity Company. Under its terms The Travelers Insurance Company was the insurer with respect to Coverage A, being bodily injury liability, and The Travelers Indemnity Company was the insurer with respect to Coverage B, being property damage liability. The aforesaid policies were written for the period from April 28, 1942, to April 28, 1944. The effective date of these policies was subsequently changed by endorsement to April 10, 1942. The policies were all cancelled effective July 30, 1943, the project having been completed before that date.

That in addition to the aforesaid policies The Travelers Indemnity Company caused to be issued to the Walter Butler Company in connection with the aforesaid naval construction project Idaho Compensation Surety Bond No. 2873. Said Bond was issued pursuant to the requirements of subsection 2 of section 43-1601 of the Idaho Workmen's Compensation Law and covered the liability for workmen's and occupational disease compensation all as hereinabove admitted. No premium was charged the insured for the Compensation Surety Bond, the bond being an undertaking between The Travelers Insurance Company and the Travelers Indemnity Company, and no commission was paid by the defendants to anyone in connection therewith. [38]

The standard premiums developed under these policies, i.e., the premium developed in accordance with the classifications and rates of premium shown in the policies and without the application of the Comprehensive Insurance Rating Plan Endorsement were as follows:

Policy No.	Company	Standard Premium
Idaho		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	\$1,200,211.06
WSLG-863387	The Travelers Insurance Company	74,460.10
WSLA-863388	The Travelers Insurance Company	13,768.80
	The Travelers Indemnity Company	6,168.46
Total		<hr/> \$1,294,608.42
Washington		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	35.64
WSLG-863387	The Travelers Insurance Company	2.06
		<hr/> 37.70
Grand Total		<hr/> \$1,294,646.12

The breakdown of the final premium developed under these policies in accordance with the Comprehensive Insurance Rating Plan Endorsement is as follows on the basis of an evaluation of losses as of September 28, 1945.

Policy No.	Company	Earned Premium
Idaho		
WUB-863386	The Travelers Insurance Company Compensation	\$236,364.79
	O. D.	448.61
		\$ 236,813.40
WSLG-863387	The Travelers Insurance Company	4,908.39
WSLA-863388	The Travelers Insurance Company	1,121.19
	The Travelers Indemnity Company	3,281.37
	Total	\$ 246,124.35
Washington		
WUB-863386	The Travelers Insurance Company Compensation.....	\$1.87
	O. D. ....	.21
		2.08
WSLG-863387	The Travelers Insurance Company	1.13
	Total	3.21
	Grand Total	\$ 246,127.56

The aforesaid total premium of \$246,127.56 represents the earned premiums on a retrospective basis in accordance with the terms of said insurance policies, as required by the Bureau of Yards and Docks of the U. S. Navy; that said figure is still subject to final adjustment; that no commission was payable or paid by the defendants to any agent or broker for the placing of the aforesaid business with the defendants; that no commission was payable or paid by the defendants to any agent or broker for any other services in connection with the aforesaid busi-

ness with the defendants except such amount as was paid to Eugene H. Ware for his countersigning service as aforesaid; that Eugene H. Ware had nothing whatsoever to do with making, writing or placing the insurance policies aforesaid or the servicing thereof, his services being confined to the simple formal act of countersigning the aforesaid policies and bond when sent to him by mail for countersignature and by mail forwarding the policies to the defendants in New York in May, 1942, and by mail forwarding the bond to the Industrial Accident Board of Idaho. That no commission was fixed or payable as provided in Exhibit A-2 of the contract attached to the complaint (dealing with risks written on a retrospective basis) the individual risks involved calling for no payment of commissions under the terms of the aforesaid Comprehensive Insurance Rating Plan.

Filed Dec. 4, 1945. [40]

That policies H.P.S. 908557 and U.B. 908556 described in Paragraph 9 of the Second Defense were made, written and placed in the State of New York and that the premiums for said policies were paid to defendants through the Acme Brokerage Corporation of New York, New York, who placed said insurance business with the defendants.

Fourth Defense

That on or about October 1, 1936, Eugene H. Ware entered into a written contract with the de-

defendants as alleged in paragraph III of the complaint, by the terms of which the said Eugene H. Ware was authorized to countersign policies of insurance, renewal receipts, certificates, and endorsements pertaining to the lines of insurance covered by said contract on proposals secured by or through said Eugene H. Ware. That on or about October 21, 1936, the said Eugene H. Ware entered into a supplemental agreement with the defendants by the terms of which defendants agreed to pay to said Eugene H. Ware a monthly remuneration of \$5.00 for a small amount of other countersigning service. That a copy of the letter in connection with said supplemental agreement is hereto attached as Exhibit 1 and made a part hereof as if here set out in full.

That thereafter the defendants paid to the said Eugene H. Ware the monthly remuneration referred to in the said supplemental agreement continuously up to and including October, 1944, and including the period during which the said Eugene H. Ware countersigned policies Nos. WUB-863386, WSLG-863387, and WSLA-863388, the bond and continuation certificate described in the complaint. [41]

That the only service rendered by the said Eugene H. Ware for the defendants, or any other person, for which plaintiff sues was the simple formality of countersigning the policies, the bond and continuation certificate referred to in the complaint, and that for such service defendants paid to the said Eugene H. Ware the amount provided in said supplemental agreement. That by virtue of the mat-

ters in this Fourth Defense alleged, plaintiff waived the benefit, if any, of Section 40-902 I.C.A. as amended by Chapter 61, Idaho Session of Laws of 1939.

Wherefore the defendants deny that the plaintiff is entitled to the relief prayed for in the complaint or any part thereof or to any other relief against the defendants, and pray that the complaint be dismissed with costs.

/s/ C. H. POTTS,

/s/ CHARLES HOROWITZ.

(Copy acknowledged.)

Filed: Dec. 4, 1945. [42]

EXHIBIT 1

October 21, 1936.

Eugene H. Ware Company
104 Fourth Street
Coeur d'Alene, Idaho

Attention: Mr. Ware

Dear Mr. Ware:

Yesterday Field Assistant Gilbert sent you new contract forms to sign in view of the fact that he inadvertently used the wrong form when he secured your signature during his personal visit to Coeur d'Alene last month.

Following Mr. Gilbert's explanation of our proposed arrangement to reimburse an Idaho agency

for handling a small amount of countersigning that will be necessary from time to time, I recommended to our Home Office that your agency be recognized in this manner. I am now in receipt of advices that your agency has been approved for this service as of October 1, 1936. On the basis of a monthly remuneration of \$5.00, payment for the month of October will be forwarded to you as of November 1 by the Auditor and a like amount each month thereafter until otherwise advised.

Yours very truly,

W. P. SIZEMORE,
Manager.

WPS:EP [43]

[Title of District Court and Cause.]

REPLY

Now comes Mary Broderick, Administratrix with the Will Annexed of the Estate of Eugene H. Ware, Deceased, substituted as plaintiff herein and in reply to the answer of the defendants, alleges and states and denies:

I.

In respect to the second defense this plaintiff denies all affirmative matters therein contained except as hereinafter specifically admitted and particularly denies the allegations of paragraph 8 of said first affirmative defense and denies each and every allegation contained in paragraph 9 as to the amount of premiums earned.

II.

In respect to the third defense this plaintiff denies each and every affirmative allegation therein contained and denies each and every allegation of said third defense except such as are admissions of the facts contained in plaintiff's complaint, and allege that, according to the information which this plaintiff has received, the said defendants received from Walter Butler Company in excess of \$1,170,000.00 as premiums for compensation insurance and that they made a report to the State of Idaho setting forth said figures and paid the State of Idaho taxes thereon, and that in addition thereto, the said defendants made demand against Walter Butler Company [44] for payments of said amount and as this plaintiff is informed and believes and therefore alleges the fact to be, said bills were approved and paid and in addition thereto the defendant collected from said Walter Butler Company under the policies alleged in plaintiff's complaint largely in excess of \$100,000.00 for premiums on the contracts of insurance covering property damage and public liability.

In regard to the allegations of said third affirmative defense regarding the execution of the surety bond in connection with the workmen's compensation undertaking, this plaintiff alleges that the same was a part of said agreement and constitutes a part of the contract of said insurance and that, as this plaintiff is informed and believes, the amounts set forth in said third affirmative defense is the amount of \$1,294,608.42 was actually collected by the said

defendants and tax thereon paid to the State of Idaho as and for a tax upon the premiums collected in said work, and this plaintiff denies all of the allegations of said third defense other than as herein specifically alleged. Denies that said E. H. Ware was paid any sum whatsoever for countersigning said policies or that there was any agreement that he was to receive any sum whatsoever therefor other than the standard and regular commission of ten per cent and alleges that any agreement claimed to have been made by the defendant whereby the said Eugene H. Ware or Eugene H. Ware Company, as the resident agent, was not to be paid the full commission provided by law was and is void, prohibited by the Statutes of the State of Idaho and against the public policy of the State of Idaho and, if every made, which the plaintiff denies, was and is void and of no force or effect whatever. Denies that the policies were made, written or placed in the State of New York or that they were written through any brokerage agents except under some arrangement made by the defendants and *with the* plaintiff's knowledge whatsoever. [45]

III.

Further answering said fourth defense, the defendant denies each and every allegation contained in said fourth defense and denies that the purported letter under date of October 21, 1936, attached to the complaint was ever made a contract between the parties was ever written for the purpose of waiving the fees on any business developed in the

territory covered by the plaintiff's contract with the defendant and denies that it had any reference to business written within the territory served by the plaintiff or included in his contract whatsoever and alleges that the same does not constitute any contract or intended by the defendant so to do and was and is null and void and in contravention of the statutes of the State of Idaho and against the public policy of the State of Idaho and of no force or effect whatsoever.

/s/ EZRA R. WHITLA,

/s/ E. T. KNUDSON,

Attorneys for Plaintiff.

[Service Acknowledged.]

Filed: July 18, 1946. [46]

[Title of District Court and Cause.]

No "Motion for Trial" as requested in item 4 of Designation, filed. [47]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO AMEND ANSWER
BY WAY OF TRIAL AMENDMENT

Come Now the defendants and, pursuant to Rule 15 of the Rules of Civil Procedure, move the above-entitled court for an order permitting the defendants to amend their answer by way of trial

amendment, adding a Fifth Defense in form hereto attached and made a part hereof.

Defendants further pray that the proposed trial amendment be deemed added to the answer without the necessity of serving or filing an amended answer embodying said trial amendment.

/s/ WM. S. HAWKINS,

/s/ C. H. POTTS,

/s/ CHARLES HOROWITZ.

Filed: Nov. 18, 1946. [48]

[Title of District Court and Cause.]

TRIAL AMENDMENT TO ANSWER
Fifth Defense

That the complaint fails to state a claim against the defendants, or either of them, upon which relief can be claimed in that the statutes of Idaho providing for countersignature by a resident agent of Idaho, as described in paragraph III of the complaint, particularly section 40-902 Idaho Code Annotated, as amended by chapter 61, Law, 1939, page 109, if construed in accordance with the allegations of the complaint, are null and void because in violation of the XIVth Amendment to the Federal Constitution, Section 1 thereof, and in violation of the Commerce Clause of the Federal Constitution, being Article 1 Section 8, Clause 3 thereof; that the aforesaid statutes, particularly said Section 40-902, as amended, are void as in violation of the aforesaid

Federal Constitution in that, among other things, they (1) purport to have extra territorial effect; (2) arbitrarily and capriciously increase the expenses of defendants as foreign insurance companies who write insurance on risks located in Idaho, whether such risks be written within or without the State of Idaho; (3) yield a countersigning agent a pecuniary reward out of all [49] proportion to any services contributed by him; (4) arbitrarily and capriciously deprive the defendants of their liberty of contract, including their liberty to agree as to what is a fair and reasonable compensation for nominal services, and to pay therefor, and (5) unduly and substantially burden, obstruct and discriminate against interstate commerce in the making, writing and placing of insurance.

/s/ WM. S. HAWKINS,

/s/ C. H. POTTS,

/s/ CHARLES HOROWITZ.

Filed: Nov. 18, 1946. [50]

[Title of District Court and Cause.]

ORDER

Motion for inspection of documents before trial, having heretofore been filed by the plaintiff, and have been fully presented, and the Court being *advise*,

It is hereby Ordered that the said motion be and the same is granted, and

It is further Ordered that the defendants be permitted to furnish copies of all original records, in-

struments and documents made in typewriting, in lieu of producing any of such originals in Idaho, but subject to the inspection of such originals at the home office, and

It is further Ordered that said records and copies be furnished for inspection within twenty days from date hereof.

Dated this 3rd day of April, 1946.

CHASE A. CLARK,

United States District Judge.

Filed: April 3, 1946. [51]

[Title of District Court and Cause.]

ORDER

Motion to require plaintiff to reply to the answer of defendants having been heretofore filed and having been fully presented to the Court and after consideration the Court being advised,

It is Ordered that the said motion be and the same is hereby granted, and

It is Ordered that the said reply be filed within ten days after the documents and records, or copies of same are furnished to the plaintiff, as ordered by this Court on this date.

Dated April 3, 1946.

CHASE A. CLARK,

United States District Judge.

Filed: April 3, 1946. [52]

[Title of District Court and Cause.]

STIPULATION

It is stipulated by and between the parties to this action by and through their counsel of record, as follows: That

I.

The standard premiums developed under these policies, i.e., the premium developed in accordance with the classifications and rates of premium shown in the policies and without the application of the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement were as follows:

Policy No.	Company	Standard Premium
Idaho		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	\$1,200,211.06
WSLG-863387	The Travelers Insurance Company	74,460.10
WSLA-863388	The Travelers Insurance Company	13,768.80
	The Travelers Indemnity Company	6,168.46
Total		<hr/> \$1,294,608.42
Washington		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	35.64
WSLG-863387	The Travelers Insurance Company	2.06
		<hr/> 37.70
Grand Total		<hr/> \$1,294,646.12

The breakdown of the final premium developed under these policies in accordance with the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement, is as follows, on the basis of an evaluation of losses as of September 28, 1945.

Policy No.	Company	Earned Premium
Idaho		
WUB-863386	The Travelers Insurance Company Compensation	\$236,364.79
	O. D.	448.61
		\$ 236,813.40
WSLG-863387	The Travelers Insurance Company	4,908.39
WSLA-863388	The Travelers Insurance Company	1,121.19
	The Travelers Indemnity Company	3,281.37
	Total	\$ 246,124.35
Washington		
WUB-863386	The Travelers Insurance Company Compensation.....	\$1.87
	O. D. ....	.21
		2.08
WSLG-863387	The Travelers Insurance Company .....	.13
	Total	2.21
	Grand Total	\$ 246,126.56

The aforesaid total premium of \$246,126.56 represents the earned premiums on a retrospective basis under War Projects Insurance Rating Plan; that said figure is still subject to final adjustment.

That the premium for Workmen's Compensation and occupational disease as reported to the Industrial Accident Board of the State of Idaho and tax paid on \$449,556.01 for the period July 1, 1942, to December 31, 1942, and that tax was paid on [54] the amount of \$171,492.41 for the period January 1, 1943, to June 30, 1943, and that report was made to the Industrial Accident Board for the period July 1, 1943, to December 31, 1943, of return premiums in the sum of \$439,417.90 and that on February 26, 1943, the Travelers Insurance Company reported to the Director of Insurance and paid the 3 per cent tax to him on accident, health, personal liability, and workmen's compensation in the sum of \$558,994.21 for the year 1942, and that various reports were made to the Industrial Accident Board of the State of Idaho showing for the years 1942, 1943 and 1944 premiums of \$727,524.30 less return of \$439,417.90. Tax was paid semi-annually to the Industrial Accident Board and annually to the Bureau of Insurance upon the basis of the amount of premiums for the period reported. No refund of tax has been made by the Industrial Accident Board or by the Bureau of Insurance of the State of Idaho on account of the return of premiums reported by the defendants. No action has been commenced by the defendants nor have any court proceedings been taken by the defendants therein since the tax payments were made. The defendants' letter of February 8, 1944, to the Industrial Accident Board informed the Board of the amount of return of premium in the sum of \$439,417.90 for the period

of July 1, 1943, to December 31, 1943, and requested the Board to advise the Company of the procedure to follow in order to obtain the tax refund of \$4391.18. The defendants' letter of February 28, 1944, to the Director of Insurance informed the Director of the amount of return of premium in the sum of \$273,871.95 for the year of 1943 and requested the [55] Director to advise the defendants of the procedure to follow in order to obtain the tax refund of \$8216.16.

II.

The earned premium under policy HPS-908557 was as follows: The Travelers Insurance Company \$11.10, the Travelers Indemnity Company \$3.43; that the earned premium on Policy UB-908556 earned by the Travelers Insurance Company was \$99.45.

III.

Total premiums paid by the Walter Butler Company to The Travelers on Policies issued under the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement

Deposit Premium	\$ 47,519.66	
Total Audit Premium (including Washington)	647,323.06	
	<hr/>	
	694,842.72	
Less Washington Premium..	18.85	
	<hr/>	\$694,823.87
Total Amount of Return Premium (Subject to final adjustment)		448,699.52
		<hr/>
Net amount of Earned Premium (Idaho only).....		\$246,124.35

Amount of Premium on which Taxes were paid on Policies issued under the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan endorsement

	Premiums on Which Taxes Were Paid	Refund Claimed	Total Premium as figured under War Projects Insurance Rating Plan
(1) Workmen's Com- pensation	\$535,599.84	\$291,071.36	\$244,528.48
(2) Automobile Bodily Injury	1,238.24	117.05	1,121.19
(3) Liability other than automobile	31,246.08	26,339.59	4,906.49
(4) Automobile Prop- erty Damage (Travelers Indem- nity Co.)	3,281.38	-----	3,281.38
	<hr/>	<hr/>	<hr/>
	\$571,365.54	\$317,528.00	
The Travelers Insurance Co. Items			
(1), (2), and (3).....		\$250,556.16	
The Travelers Indemnity Co. Item			
(4)		3,281.38	
		<hr/>	
Total Premiums			\$253,837.54*

*Defendants assert that a further sum is to be refunded so as to make the earned premium paid and payable on which the Idaho premium taxes must be paid \$246,124.35.

Premiums and Taxes on the UB and HPS policies not issued under the War Projects Insurance Rating Plan

	Premium	*Taxes 3%	**Taxes 1%
UB-908556			
Workmen's Compensation	\$99.45	\$2.98	\$.99
HPS-908556			
Bodily Injury Liability.....	11.10	.33	-----
Property Damage Liability.....	3.43	.10	-----

*Taxes paid to Idaho Insurance Department.
**Taxes paid to Industrial Accident Board.

IV.

It Is Stipulated that the written data furnished plaintiff by the defendants on plaintiff's motion for inspection, or duplicates thereof, or the instruments

from which the copies were made, may be offered in evidence by any party hereto as genuine and in lieu of the original, subject to any other objection as to admissibility.

It Is Further Stipulated that in the event the written data furnished plaintiff on plaintiff's motion for inspection or duplicates thereof, or the copies from which they were made, are admitted in evidence, a written memorandum explaining how said admitted documents may be used to show the premiums paid may be admitted in evidence. The witness preparing the written statement to be present and subject to plaintiff's examination thereon.

V.

It Is Further Stipulated That the War Projects Insurance Rating Plan for Cost-Plus-Fixed-Fee Contract, a copy of which [57] has heretofore been served upon the plaintiff in response to plaintiff's request for admission, is true and genuine, and that said plan may be offered in evidence, subject to plaintiff's right to object as to the legality of the use of said plan in the State of Idaho and as to the War Projects Insurance Rating Plan Endorsement being a part of the policies in question. It Is Further Stipulated that said plan was applied as to Policies Nos. WUB 863386, WSLG 863387, and WSLA 863388 under the Walter Butler contract involved herein for the construction of the Farragut Naval Station at or near Bayview, Idaho.

VI.

The audited interim premiums on the policies in-

volved herein in the amount of \$694,823.87 was actually paid to the defendants on account of the policies in controversy and that the defendants returned to Walter Butler Company the sum of \$440,985.33, under provisions of the War Projects Insurance Rating Plan claimed to be a part of the three policies first described in Paragraph I. That no court action was ever commenced against the State of Idaho to recover tax paid on returned premiums.

VII.

It Is Stipulated that the defendants, and each of them, are insurance companies incorporated under the laws of Connecticut, with their home office at Hartford, Connecticut, and engaged in the insurance business; that each of said companies at all times described in the pleadings herein was licensed to do business in the State of Idaho. [58]

VIII.

It Is Further Stipulated that Exhibit 1 attached to the defendants' Answer is a true and correct copy of a letter written by the defendants to Eugene H. Ware Co. on October 21, 1936, and received and accepted by Eugene H. Ware Co. on or about said date. That the original of said letter may be offered in evidence, or a copy thereof may be offered in evidence, without production of the original, subject to any objections as to its admissibility other than its genuineness and other than the fact that it is a copy.

IX.

Nothing in this stipulation shall prevent either

party from offering evidence otherwise admissible or explanatory of the matters stipulated herein not inconsistent with this stipulation.

Dated this 29th day of April, 1947.

EZRA R. WHITLA,
E. T. KNUDSON,
Attorneys for Plaintiff.

/s/ WM. S. HAWKINS,
C. H. POTTS,
By WM. S. HAWKINS.
/s/ CHARLES HOROWITZ,
Attorneys for Defendants.

Filed April 30, 1947. [59]

[Title of District Court and Cause.]

OPINION

Clark, District Judge.

September 15, 1947.

One Eugene H. Ware, an Insurance Agent doing business in Kootenai County, Idaho, brought this action against the defendants alleging that he was the duly appointed agent of the defendant companies and licensed by them. That he was duly qualified, licensed resident insurance agent of the State of Idaho and further alleges that he, Ware, entered into a written contract as resident agent of the defendant Companies, which contract is set forth in full as exhibit A attached to plaintiff's com-

plaint. The Contract is in the usual form of agency contract and provides for the payment of certain commissions on risks written or renewed by him during the continuance of the contract. The contract also provided that said Ware was authorized to countersign policies of insurance, renewal receipts, certificates and endorsements pertaining to the lines of insurance covered by the contract unless otherwise advised, and further alleges that under the laws of the State of Idaho, plaintiff [60] was entitled as such resident agent to the commission as provided in said contract, on all policies written by the Companies and each of them and submitted to the plaintiff for countersignature as resident agent of the said Companies. It is not necessary to set the contract forth in full.

The plaintiff Ware, in addition to the written contract, had a separate arrangement with the defendant companies that he would act as countersigning agent for the agreed compensation of \$5.00 per month. The said Ware placed insurance for the defendant companies under his written contract and also acted as countersigning agent on insurance that was obtained by the head office of the defendant companies during the time he was acting as agent.

There are two separate contracts. First; the written contract which applies to proposals of insurance secured by the agent and placed by him. Second; The contract that provided that the defendant would pay Mr. Ware \$5.00 per month as countersigning agent for the defendant Companies.

This action was originally before the Court on a motion to dismiss the complaint on the ground that it did not state a claim against the defendant Companies and at the time of the argument on this motion it was contended by the plaintiff that he did not rely upon the written contract for the recovery sought but relied exclusively upon section 40-902 Idaho Code Annotated, which provides as follows:

“Foreign companies — Resident agents — Countersigning policies.

It shall be unlawful for any foreign Insurance Company doing business in this State to make, write, place or cause to be made, written or placed in this State any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued (except policies of life [61] insurance) and shall receive the full commission when the premium is paid, to the end that the state may receive the tax required by law to be paid on the premiums collected for insurance on all persons and property resident or located within this state: Provided, this section shall not apply to life insurance companies.”

And under the amendment set forth in the 1939 Session laws of the state of Idaho at page 109 which reads as follows:

Section 40-902. Foreign Companies—Resident Agents—Countersigning policies. It shall be unlawful for any foreign insurance company doing business in this state to make, write, place or cause to be made, written or placed in this state any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property resident, situated or located in this state, unless done through an agent who is a resident of this state, legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premiums is paid, except when said policy is made, written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than five per cent of the premium paid: * * * Provided, this section shall not apply to life insurance companies.

Contending under these provisions that Ware was entitled to the full commission on any policies countersigned by him as resident agent in the State of Idaho. This Court sustained the motion of the defendant to dismiss on the ground "that the statute upon which this action is based is repugnant to the 14th amendment of the Constitution and is also an unconstitutional restriction upon Interstate Commerce." This case was appealed to the Circuit Court of Appeals of the 9th Circuit and this Court was re-

versed. *Ware v. Travelers Insurance Companies* 150 Fed. (2) 463.

The Circuit Court of Appeals in that decision passed only upon the constitutional question and held that the statute was valid and was well within the power of the state over insurance companies against local risks and the case was returned to this Court for further proceedings. In the meantime Eugene H. Ware dies and Mary Broderick administratrix [62] with will annexed of the Estate of Eugene H. Ware deceased was substituted as plaintiff. Answer was filed admitting Eugene H. Ware was a citizen and resident of Coeur d'Alene, Idaho; admitting the corporate capacity of the defendant companies; admitting that Mr. Ware, during his lifetime was a duly qualified and licensed insurance agent according to the laws of Idaho; admitting that the defendant companies caused said Ware to be duly licensed as their resident agent in the State of Idaho and caused a certificate of his appointment to be made and delivered to him; admitting the written contract set forth as exhibit "A" and "A-1", but alleging that the insurance policies in question here were written and placed by the defendant companies under what is known as the War Projects Rating plan and countersigned by Ware as its countersigning agent in accordance with the contract under which he was to receive \$5.00 per month.

It is agreed by the plaintiff that the policies were not written under the written contract, and plaintiff relies exclusively on the Statute for recovery, so the facts as presented to the Court are:

The defendants had an arrangement with Mr. Ware to act as countersigning agent for an agreed sum of \$5.00 per month; they forwarded him three policies, No. 863386; No. WSLC-863387 and No. WSLA-863388.

The breakdown of the final premium developed under these policies in accordance with the War Projects Insurance Rating Plan, sometimes referred to as the comprehensive Insurance rating plan endorsement, is as follows, on the basis of an evaluation of losses as of September 28, 1945.

Policy No.	Company	Earned Premium
WUB-863386	The Travelers Insurance Com-	
	pany Compensa-	
	tion	\$236,364.79
	O. D.	448.61
		<hr/>
WSLG-863387	The Travelers Insurance Com-	
	pany	4,908.39
WSLA-863388	The Travelers Insurance Com-	
	pany	1,121.19
	The Travelers Indemnity Com-	
	pany	3,281.37
		<hr/>
	Total	\$ 246,124.35

The proposals for these policies were received at the Home office; were written there and sent to Ware for countersigning. Mr. Ware countersigned them and returned them to the Home Office for delivery. Plaintiff prays judgment for ten (10%) per cent of the premium paid.

If Ware was to receive this commission it must be found that he was entitled to it as a matter of law as the plaintiff's right is wholly dependant on the Statute:

The Statute provides: "it shall be unlawful for any foreign insurance company doing business in this State to make, write, place or cause to be made written or placed in this State any policy or contract, duplicate policy or contract of insurance of any kind or character or any bond, duplicate policy or contract of insurance of any kind or character or any general or floating policy upon persons or property, unless done through an agent who is a resident of this State legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premium is paid, except when said policy is made, written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than five per cent of the premium paid. Provided this section shall not apply to Life Insurance Companies. (The part underlined is the amended portion of the Statute and plaintiff alleges in his complaint that the policies "were submitted to the plaintiff by the defendants and not through a licensed broker," and agrees that the amended portion of the statute has no application here.)

At the very onset counsel for the defendants again raised the constitutionality of the Statute. It is not necessary to discuss this as the decision of the Court of Appeals establishes the law of the case because it is well settled that a decision of the higher Court upon a point distinctly [64] made an

essential to its determination on a previous appeal is in all subsequent proceedings in the same case a final adjudication, so the case will be considered by the Court on the theory that the law of the case has been decided. However, the contention of the plaintiff that the case was fully decided in that decision is, in this Court's opinion, an incorrect interpretation of the decision of the Court of Appeals, as the Court said on page 464 of that opinion (which is entitled *Ware v. Travelers Insurance Co.*, 150 Fed. (2) 463).

“Appellees contend that the Idaho Statute has no application to the policies and bonds written in this instance, inasmuch as they were not negotiated or written in Idaho. They say, too, that the phrase ‘full Commission’ has no meaning as applied to a situation where no agent has received a commission. They argue further that the statute is not to be read into *Ware’s* contract; and that assuming a right of recovery is intended to be conferred on the agent, nevertheless the right may be waived, and in this instance impliedly was waived by *Ware* in his contract with the Companies. However, the court below did not rule on these questions and we do not feel called upon to decide problems of local law of such consequence without benefit of the contribution which the Federal Judge in Idaho is in position to make. Moreover, the questions may more intelligently be considered in the light of all the facts as disclosed in the course of a trial.”

It will be noted therefore that the Court only passed on the constitutionality of the Statute and was not passing on the statute in the light of the evidence introduced in this case. While this Court is under obligation to follow the law of the case as to the constitutionality of Section 40-902 Idaho Code Annotated, it still remains for the Court to determine whether under the Statute, the plaintiff is entitled to recover in this case.

If the right to recover exists *in* must be found that it exists under the Statute alone, independent of the agency contract held by Ware, as it is agreed that this action is prosecuted, not on the contract, but on the statute. [65]

The first question then to consider is: Does the Statute, under the facts here, entitle the plaintiff to the relief prayed for? The Court will not consider whether there is a right of recovery for the countersigning service rendered by Eugene H. Ware under the provisions of the agency contract dated October 1, 1936 as that is not before the Court. The defendants acting independently of the contract obtained the proposals and placed the insurance. However, they were attempting not to violate the law, but to comply with its requirements. They forwarded the policies to Mr. Ware for countersignature; Ware would thereupon countersign the policies and return them to the defendants. The only compensation that Ware received for this countersigning was the agreed fee of five dollars per month.

This case had to be tried without the benefit of Mr. Ware's testimony but it does not appear in the

record where there was any other consideration agreed upon between the parties, except the agreed fee, which was regularly paid. There is nothing in the evidence to indicate that Ware was to receive any special commission for approving and countersigning the so-called home office policies. There is no contract in existence here between Ware and the defendants for a stipulated commission. There is no Statute in the State of Idaho that enlarges the stature now before the Court, or is helpful in determining the rights of the insurance agent where the statute above quoted is violated. The legislature has not seen fit to fix any mandatory commission that must be paid to agents in the state in placing or signing foreign companies' policies doing business in this State. As far as the statute goes it makes it unlawful for a foreign company to "make, write, place or cause to be made or placed in this state" any insurance unless it is [66] done through an agent who is a resident of the State. This part of the Statute has been complied with. It is not necessary to spend time on the words "make, write, place or cause to be made, written or placed in this state" as I feel it is immaterial here. However, the final act in executing this contract was the countersigning of it by Mr. Ware. The risk covered by the insurance was located within the State of Idaho, so I think it can safely be said at least that the contract was written and placed within the State. This being so, it was necessary that the defendant companies should pay the full commission when the premiums were paid, to the Idaho agent. In this

case it is apparent that no commission was paid, so there is no basis upon which to arrive at the amount that would be due Ware, except the statement that ten per cent was generally considered the commission to be paid. However it must be remembered that under the Idaho law there is nothing to prevent an agent from contracting on the amount of commission that he sees fit to receive for his services. He is not prohibited from contracting for one per cent commission or a twenty per cent commission. The Insurance Company is prohibited however from paying any commission outside of the State. There was nothing unlawful in Mr. Ware making the contract with the defendant companies that he would countersign the policies at five dollars per month.

The Court cannot write remedies into the statute which are not specifically mentioned.. It cannot be said that an agent is specifically given, under this section of the statutes, a right of action to recover and if the statute was to be so construed, that he does have a right of action, his right to recover is limited to the full commission that was paid to out of state agents in writing the policies.

It is unfortunate in the Court's opinion that the Statute does not cover the case now before this Court. In a [67] proper action it might be said that the war rating plan, under which the insurance involved in this action was written, was not permissible under the Statute of Idaho. It seems without question that the plan was set up with the thought in mind of avoiding the payment of commissions, but regardless of that fact the Court is unable, after

reading the statute into and making it a part of the contract, which provides that he shall have the full commission when the premium is paid, determine what, if any, commission could be allowed when no commission is agreed upon and no commission is paid.

In viewing this statute I am taking the position that the Insurance Company in all its operations is subject to the regulations of the state as to rates, agency contracts and terms of the policy, and when the legislature has acted upon these matters they become public policies of the State and cannot be departed from by the parties. I agree that they cannot be waived, and that the public policy cannot be departed from. If an agent's commission was fixed by law it cannot be waived. If there was any commission paid there can be no compromise, it must be paid to the agent in full. It is a declaration of the public policy of this State and binding upon all of the parties, but applying the statute to the facts of this case and making it a part of the contract under which Ware countersigned the policies in question; I find that Section 40-902 of the Idaho Code Annotated is constitutional and valid and that the opinion of the Circuit Court of Appeals, Ninth Circuit, is final on this question.

I find that there was no commission paid outside the State of Idaho.

I find that there is no right to recover for the countersigning service by Eugene H. Ware. [68]

I find that Ware has been paid for such services under his agreement to accept the \$5.00 per month therefore.

I find that there was no commission fixed by the Statute or otherwise to be paid Mr. Ware on the insurance here involved.

I find that the customary commissions paid on similar policies form no basis for fixing commissions in this case.

I can find no provision that would permit this Court to fix the amount of commission that should be paid Mr. Ware or any provision of the statute that applies to the facts in this case and recovery must be denied.

Filed Sept. 16, 1947. [69]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial of the above entitled cause having come on regularly to be heard April 28, 1947, before the above entitled court sitting at Coeur d'Alene, Idaho, and the taking of evidence having been concluded on May 1, 1947, the plaintiff appearing by Messrs. Whitla & Knudson, her attorneys, the defendants appearing by Wm. S. Hawkins, C. H. Potts, and Charles Horowitz of the firm of Preston, Thorgrimson & Horowitz, the case having thereafter been continued for oral argument to May 28, 1947, after oral argument the court having ordered the filing of briefs by each of the parties hereto, thereafter, after the filing of said briefs, the court having rendered a memorandum opinion under date of September 15,

1947, finding for the defendants and against the plaintiff, the court now enters its following

FINDINGS OF FACT

I.

That at all times herein mentioned prior to his death, plaintiff Eugene H. Ware was a citizen and resident of Coeur [70] d'Alene, Kootenai County, Idaho, and the defendants The Travelers Insurance Company and the Travelers Indemnity Company, and each of them were at all times herein mentioned corporations organized and existing under and by virtue of the laws of the State of Connecticut and doing business in the State of Idaho. That Mary Broderick, at the time of the commencement of the trial of the above entitled cause and at all times since, is the duly acting and qualified administratrix with will annexed of the Estate of Eugene H. Ware, deceased, substituted as plaintiff herein. That the amount in controversy in this action exceeds the sum of \$3,000, exclusive of interest and costs.

II.

The plaintiff Eugene H. Ware, also known as E. H. Ware, since January 1, 1936, and during his lifetime, was a duly qualified and licensed insurance agent according to the laws of the State of Idaho, residing in Coeur d'Alene, Kootenai County, Idaho. That said Eugene H. Ware individually also did business as "Eugene H. Ware Co." or "Eugene H. Ware Company." That the defendants caused the said Eugene H. Ware to be duly licensed as their resident agent in the State of Idaho and caused a

certificate of said appointment to be made and delivered to the said Eugene H. Ware.

III.

That on or about October 1, 1936, Eugene H. Ware entered into a written contract with the defendants as set forth in Exhibits A and A-1 to the complaint, and that such contract was amended subsequently as stated in Exhibits A-2, A-3, A-4, A-5, A-6, A-7, A-8, and A-9 to said complaint. That said exhibits read as follows: [71]

[Exhibit A—Page.....	16
A-1—Page.....	22
A-2—Page.....	23
A-3—Page.....	24
A-4—Page.....	25
A-5—Page.....	26
A-6—Page.....	27
A-7—Page.....	28
A-8—Page.....	29
A-9—Page.....	30]

* * * * *

IV.

That at all times since December 5, 1940, during the lifetime of the said Eugene H. Ware, the said Eugene H. Ware and Evelyn Thomas, an employee of the plaintiff, were appointed by the Travelers Indemnity Company its true and lawful attorney-in-fact and with full power and authority for and on behalf of said company as surety to execute and deliver and affix the seal of the company thereto to bonds, undertakings, recognizances or other written obligations in the nature thereof not exceeding the amount of \$100,000 in any single instance, under

and by virtue of a written instrument dated December 5, 1940, executed by said The Travelers Indemnity Company, a copy of such instrument, marked "Exhibit B" being attached to the complaint.

V.

That defendants The Travelers Insurance Company and the Travelers Indemnity Company are corporations owned, [81] managed and controlled by the same persons, and that they, with other companies, constitute what is generally known as "The Travelers Line," writing various kinds of insurance, and said business is done largely through the same agents. That the business activities of the defendants are jointly conducted and operated substantially as one business. That the Travelers Insurance Company and the Travelers Indemnity Company were at all times herein mentioned and are licensed to do business in the State of Idaho and to write the various types of insurance and to execute the instruments here involved to which they are signatories.

VI.

That Walter Butler Company is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Minnesota. That prior to the issuance of the hereinafter described insurance policies (said policies being described in the complaint), said Walter Butler Company entered into a cost-plus-a-fixed-fee contract with the U.S. Navy (the performance of which was under the jurisdiction of the Bureau of

Yards and Docks of the U. S. Navy) for the construction of the Farragut Naval Station at or near Bayview within the State of Idaho. That in connection with said contract the Bureau of Yards and Docks of the U. S. Navy required the hereinafter described insurance coverage, the cost of such coverage to be paid for under the terms of the aforesaid cost-plus-a-fixed-fee contract. That said insurance coverage so required was coverage to be issued under order of said Bureau of [82] Yards and Docks, originally designated under the name of "Comprehensive Insurance Rating Plan for National Defense Projects" and later designated as "War Projects Insurance Rating Plan." By the terms of the aforesaid Plan, insurance of specified character was required to be issued on a retrospective insurance premium basis that would reflect only the following items of cost:

- (a) A fixed charge to meet the administrative cost of the insurance carrier exclusive of claim administrative cost and to meet losses in excess of the maximum premium.
- (b) Losses Incurred.
- (c) A charge of 12% of the losses to take care of administrative claim requirements other than "allocated claim expenses."
- (d) Allocated claim expenses.
- (e) State taxes payable by the insurance carrier on such premiums.

The premiums so determined were in all instances subject to a maximum premium. The maximum

premium and the fixed charge premium were percentages of the standard premiums developed under the insurance policies in accordance with their terms exclusive of the Comprehensive Insurance Rating Plan endorsement.

That the aforesaid plan made provision for the selection and use by a contractor of an insurance advisor and for the payment by the contractor, and only by the contractor for the services of such advisor. That said Plan expressly prohibited the insurance carrier from paying anything whatsoever to such insurance advisor for services rendered by him, that the aforesaid Plan did not contemplate and provision was not made therein for the payment of commission to an agent or broker by the insurance carrier. That by the terms of the aforesaid Plan the Comprehensive Insurance Rating Plan Endorsement was issued and formed a part of insurance policies issued under such Plan.

That pursuant to the aforesaid Comprehensive Insurance Rating Plan said Walter Butler Company caused to be made, written and placed in the State of New York through Acme Brokerage Corporation, the insurance advisor of Walter Butler Company, the following insurance policies:

Policy WUB-863386 being standard workmen's compensation and employers' liability policy issued by The Travelers Insurance Company; Policy WSLG-863387 being comprehensive general liability policy issued by The Travelers Insurance Company; and Policy WSLA-3863388, being comprehensive automobile liability policy issued by The Travelers

Insurance Company and The Travelers Indemnity Company. That the aforesaid Policy WSLG-863387 is a severally issued policy which carries the name of both The Travelers Insurance Company and The Travelers Indemnity Company. However, The Travelers Insurance Company was the only insurer with respect to the coverage afforded under said Policy WSLG-863387. The Policy WSLA-863388 is also a severally issued policy carrying the names both of The Travelers Insurance Company and The Travelers Indemnity Company. Under its terms the Travelers Insurance Company was the insurer with respect to Coverage A, being bodily injury liability, and The Travelers Indemnity Company was the [84] insurer with respect to Coverage B, being property damage liability. The aforesaid policies were written for the period from April 28, 1942, to April 28, 1944. The effective date of these policies was subsequently changed by endorsement to April 10, 1942. The policies were all cancelled effective July 30, 1943, the project having been completed before that date.

That in addition to the aforesaid policies The Travelers Indemnity Company caused to be issued to the Walter Butler Company in connection with the aforesaid naval construction project Idaho Compensation Surety Bond No. 2873. Said bond was issued pursuant to the requirements of subsection 2 of section 43-1601 of the Idaho Workmen's Compensation Law and covered the liability for workmen's and occupational disease compensation all as hereinabove set forth. No premium was charged the

insured for the Compensation Surety Bond, the bond being an undertaking between The Travelers Insurance Company and The Travelers Indemnity Company, and no commission was paid by the defendants to anyone in connection therewith.

The standard premiums developed under these policies, i.e., the premium developed in accordance with the classifications and rates of premium shown in the policies and without the application of the Comprehensive Insurance Rating Plan Endorsement were as follows: [85]

Policy No.	Company	Standard Premium
Idaho		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	\$1,200,211.06
WSLG-863387	The Travelers Insurance Company	74,460.10
WSLA-863388	The Travelers Insurance Company	13,768.80
	The Travelers Indemnity Company	6,168.46
Total		\$1,294,608.42
Washington		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	35.64
WSLG-863387	The Travelers Insurance Company	2.06
		37.70
Grand Total		\$1,294,646.12

The breakdown of the final premium developed under these policies in accordance with the Comprehensive Insurance Rating Plan Endorsement is as follows on the basis of an evaluation of losses as of September 28, 1945.

Policy No.	Company	Earned Premium
Idaho		
WUB-863386	The Travelers Insurance Company Compensation	\$236,364.79
	O. D.	448.61
		<hr/> \$ 236,813.40
WSLG-863387	The Travelers Insurance Company	4,908.39
WSLA-863388	The Travelers Insurance Company	1,121.19
	The Travelers Indemnity Company	3,281.37
		<hr/>
	Total	\$ 246,124.35
Washington		
WUB-863386	The Travelers Insurance Company Compensation.....	1.87
	O. D. ....	.21
		<hr/> 2.08
WSLG-863387	The Travelers Insurance Company	1.13
		<hr/>
	Total	3.21
		<hr/>
	Grand Total	\$ 246,127.56

The aforesaid total premium of \$246,127.56 represents the earned premiums on a retrospective basis in accordance with the terms of said insurance policies, as required by the Bureau of Yards and Docks of the U. S. Navy; that no commission was payable or paid by the defendants to any agent or

broker for the placing of the aforesaid business with the defendants; that no commission was payable or paid by the defendants to any agent or broker for any other services in connection with the aforesaid business with the defendants except such amount as was paid to Eugene H. Ware for his countersigning service; that Eugene H. Ware's services were confined to the simple formal act of countersigning the aforesaid policies and bond when sent to him by mail for countersignature and by mail forwarding the policies to the defendants in New York in May, 1942, and by mail forwarding the bond to the Industrial Accident Board of Idaho. That no commission was fixed or payable as provided in Exhibit A-2 of the contract attached to the complaint (dealing with the risks written on a retrospective basis) the individual risks involved calling for no payment of commissions under the terms of the aforesaid Comprehensive Insurance Rating Plan. The Court makes no finding as to whether this plan was permissible under the laws of the State of Idaho.

VII.

That Policy HPS-908557, naming the Travelers Insurance Company as insurer with respect to bodily injury liability, and naming The Travelers Indemnity Company as insurer with respect to property damage liability, was issued to the Walter Butler Company, covering certain liability in connection with the Bozanta Tavern located near Hayden Lake, Idaho. That Workmen's Compensation and Employers' Liability. [87] Policy UB-908556, naming The Travelers Insurance Company as in-

surer with respect to such liability, covered certain liability in connection with the Bozanta Tavern near Hayden Lake, Idaho. That each of said policies were submitted for countersignature to Eugene H. Ware in Coeur d'Alene, Idaho, in February, 1943, and by the said Eugene H. Ware there counter-signed. That premiums for each of said policies were paid to the defendants through Acme Brokerage Corporation of New York, N. Y., who placed said insurance business with the defendants in New York. That the earned premium paid under Policy HPS-908557 was as follows: The Travelers Insurance Company, \$11.10; The Travelers Indemnity Company, \$3.43. That the earned premium paid on Policy UB-908556, earned by The Travelers Insurance Company, was \$99.45.

VIII.

That none of the aforesaid five policies was written under the contract described in paragraph III hereof. That none of said policies was written pursuant to proposals secured by Eugene H. Ware. That plaintiff alleges in the complaint that the policies involved were "submitted to the plaintiff by the defendants and not through a licensed broker."

IX.

That on or about October 1, 1936, Eugene H. Ware entered into a written contract with the defendants, as found by Paragraph III of these findings of fact. That on or about October 21, 1936, the said Eugene H. Ware entered into a valid supplemental agreement with the defendants by [88]

the terms of which defendants agreed to pay to the said Eugene H. Ware and Eugene H. Ware agreed to accept a monthly remuneration of \$5.00 for countersigning insurance policies issued by defendants on Idaho risks in the case of proposals for insurance secured outside the state and not secured by Eugene H. Ware. That the aforesaid contract and supplemental agreement thereafter continued in full force and effect and the countersigning services rendered by Eugene H. Ware were rendered under and pursuant to the aforesaid contract and supplemental agreement. That the said Eugene H. Ware has been paid in full by defendant for the countersigning services by him rendered.

X.

That at the time of the issuance of the policies hereinabove mentioned there was in full force and effect Section 40-902 of Idaho Code Annotated as amended by Chapter 61, Laws of 1939, p. 109, reading as follows:

“Foreign Companies — Resident Agents — Countersigning Policies. It shall be unlawful for any foreign insurance company doing business in this state to make, write, place or cause to be made, written or placed in this state any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state, legally commissioned and licensed to

transact insurance business therein. A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premium is paid, except when said policy is made, written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than five per cent of the premium paid: * * * provided this section shall not apply to life insurance companies." [89]

That the constitutionality of the aforesaid statute was passed upon by the Circuit Court of Appeals for the Ninth Circuit in the case of *Ware vs. Travelers Ins. Co. et. al.*, 150 F. (2d) 463.

XI.

That at and prior to the date when the policies here involved were countersigned, the defendants were foreign insurance companies licensed to do business in the State of Idaho and engaged in interstate commerce, both with respect to making, writing and placing of insurance policies and the servicing of the same. That the making, writing and placing of the insurance policies and instruments here involved were in the course of and constituted an act in interstate commerce. That under the provisions of the aforesaid statute of Idaho, no service whatsoever was required of a countersigning agent except the simple, ministerial act of countersignature. That Eugene H. Ware in fact rendered no service whatsoever to the defendants or anyone else except as hereinabove mentioned.

XII.

That the aforesaid statute applies only to foreign insurance companies and not to domestic companies. That during the time that the instruments in question were made, written and placed, there existed in active business and in active competition with the defendants in Idaho a domestic insurance company of Idaho, namely, the Idaho Compensation Company, to whom the aforesaid statute did not apply.

XIII.

That under the law of Idaho, compensation payable by an insurance company to an insurance agent for services rendered or to be rendered by him for securing proposals for insurance are customarily fixed by contract between the insurance carrier and the insurance agent, on terms and conditions mutually satisfactory to each, and such contract governs the rights of the parties thereto.

Done in pen Court this 27th day of October, 1947.

CHASE A. CLARK,
District Judge.

From the foregoing Findings of Fact, the Court enters its following

CONCLUSIONS OF LAW

I.

The Idaho statute (Section 40-902 as amended), as set out in the Findings of Fact aforesaid, is, under the doctrine of the law of the case, constitutional.

II.

The Idaho Statute (Section 40-902 as amended), as set out in the Findings of Fact aforesaid, contains no provision fixing the amount of commission that should be paid to the plaintiff for countersigning services rendered by him, nor does any provision of said statute apply to the facts in this case so as to permit recovery, and customary commissions, if any, paid on insurance [91] proposals secured in Idaho by Idaho agents form no basis for fixing commissions to the plaintiff in this case.

III.

The plaintiff has been paid for the countersigning services rendered under the agreement of Eugene H. Ware to accept \$5 per month therefor.

IV.

Defendants are entitled to a judgment of dismissal with prejudice and with costs.

Done in Open Court this 27th day of October, 1947.

CHASE A. CLARK,
District Judge.

Filed Oct. 27, 1947. [92]

[Title of District Court and Cause.]

DECREE AND JUDGMENT

Trial of the above entitled cause having come on regularly to be heard April 28, 1947, before the

above entitled court sitting at Coeur d'Alene, Idaho, and the taking of evidence having been concluded on May 1, 1947, the plaintiff appearing by Messrs. Whitla & Knudson, her attorneys, the defendants appearing by Wm. S. Hawkins, C. H. Potts, and Charles Horowitz of the firm of Preston, Thorgrimson & Horowitz, the case having thereafter been continued for oral argument to May 28, 1947, after oral argument the court having ordered the filing of briefs by each of the parties hereto, thereafter, after the filing of said briefs, the court having rendered a memorandum opinion under date of September 15, 1947, finding for the defendants and against the plaintiff, the court having entered its findings of fact and conclusions of law, and being fully advised in the premises, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the above entitled cause, action and complaint be and the same are hereby dismissed with prejudice and with costs to the defendants.

Done in Open Court this 27th day of October, 1947.

Presented by:

CHASE A. CLARK,

District Judge.

WM. S. HAWKINS and

CHARLES HOROWITZ,

Attorneys for Defendants.

(Entered in Civil Docket Oct. 27, 1947.) [93]

Filed Oct. 27, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Mary Broderick, Administratrix with the Will Annexed, of the estate of Eugene H. Ware, deceased, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 27th day of October, A.D., 1947, denying the plaintiff recovery and ordering that the Complaint be dismissed with prejudice to the defendants.

Dated this 24th day of January, A.D., 1948.

EZRA R. WHITLA,

E. T. KNUDSON,

Attorneys for Appellant, residence and P.O. Address, Coeur d'Alene, Idaho.

(Copies of above Notice mailed to C. H. Potts, Wm. S. Hawkins and Charles Horowitz, by the Clerk on Jan. 24, 1948.

Filed Jan. 24, 1948. [94]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

This Cause came regularly on for hearing before the Honorable Chase A. Clark, sitting without a jury, at Coeur d'Alene, April 30th, 1947.

Appearances

Ezra Whitla, of Coeur d'Alene, Idaho; and E. T. Knudson, of Coeur d'Alene, Idaho; Attorneys for the Plaintiff. [95]

William S. Hawkins, of Coeur d'Alene, Idaho; C. H. Potts, of Coeur d'Alene, Idaho; and Charles Horowitz, 2000 Northern Life Tower, Seattle, Wash.; Attorneys for the Defendant.

G. C. Vaughan, Official Reporter, Boise, Idaho.

April 30th, 1947, 10:00 A.M.

Mr. Whitla: If the Court please, it has been agreed between counsel that Mary Broderick is the duly qualified and acting Administratrix, With the Will Annexed, of the estate of Eugene H. Ware.

Mr. Horowitz: That is correct.

The Court: And she is now substituted as party plaintiff here?

Mr. Whitla: That is right.

The Court: Very well. That may be understood.

Mr. Whitla: There are a number of records that were furnished here, in fact a very large amount of these records, and there are some that we do not want to introduce in evidence, and some that we do not want to be bound by. Some of them I shall not object to their going in, but I will not introduce them myself, and there are others that I will have an objection to their materiality.

The Court: You may make your offer; after these records are identified you may point out for

the record the part of any exhibit which you are not introducing.

Mr. Whitla: Very well. And there is a stipulation of facts prepared and filed in this case. This stipulation [100] shows the premiums developed and paid in accordance with the regular standard rates, and also under what is called the War Project Rating Plan, and what it would amount to, and there are other matters, such as matters of refunds, and requests for refunds of taxes——

The Court: Let me ask you, gentlemen: Isn't there just one question involved here, and that question, What was actually paid in commissions outside of the state of Idaho? In case the plaintiff is entitled to recover, Mr. Whitla, it would be immaterial what the regular rate was, or what the War Project Risk Rate was. The question is under the statute as to the actual commissions paid outside of the State of Idaho, at least that is the Court's view at this time.

Mr. Horowitz: There are five policies involved here. Three were written under the War Project Rating Plan, and there is no provision for commission on those. The last two, in 1943, did carry a very small amount of commission, which will be shown.

The Court: Without passing on the question at this time, and, of course basing my opinion on what has been before the Court on previous occasions, I cannot see where there is any necessity of proof of anything here except what commissions were paid,

if there were any paid, to anyone for writing this insurance, and any that might have been paid outside of the state of Idaho.

Mr. Horowitz: The facts will show that there was no commission paid on these policies, but I think the issues will be a little broader than your Honor indicates.

The Court: You understand, of course, that the higher court has said that this Idaho statute was a good statute, and we must proceed under that. I am also wondering if at this time it would not be well to agree that the stipulation may be copied into the record at this point?

Mr. Horowitz: That is agreeable.

Mr. Whitla: Yes; it is agreeable with the plaintiff.

The Court: Very well. Then the Reporter may copy the stipulation into the record at this point.

“In the District Court of the United States for the District of Idaho, Northern Division. Civil Action No. 1562-N. Mary Broderick, Administratrix, with the Will Annexed, of the Estate of Eugene H. Ware, Deceased, Plaintiff, vs. The Travelers Insurance Company, a corporation of the State of Connecticut, and The Travelers [102] Indemnity Company, a corporation of the State of Connecticut, Defendants.

“It Is Stipulated by and between the parties to this action, by and through their counsel of record, as follows: That

“I.

“The standard premiums developed under these policies, i.e., the premium developed in accordance with the classifications and rates of premiums shown in the policies and without the application of the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement were as follows:

Policy No.	Company	Standard Premium
Idaho		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	\$1,200,211.06
WSLG-863387	The Travelers Insurance Company	74,460.10
WSLA-863388	The Travelers Insurance Company	13,768.80
	The Travelers Indemnity Company	6,168.46
	Total	<hr/> \$1,294,608.42
Washington		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	35.64
WSLG-863387	The Travelers Insurance Company	2.06
		<hr/> 37.70
	Grand Total	<hr/> \$1,294,646.12

“The breakdown of the final premium developed under these policies in accordance with the War

Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement, is as follows on the basis of an evaluation of losses as of September 28, 1945.

Policy No.	Company	Earned Premium	
Idaho			
WUB-863386	The Travelers Insurance Company		
	Compensation	\$236,364.79	
	O. D.	448.61	\$236,813.40
WSLG-863387	The Travelers Insurance Company		4,908.39
WSLA-863388	The Travelers Insurance Company		1,121.19
	The Travelers Indemnity Company		3,281.37
Total			\$246,124.35
Washington			
WUB-863386	The Travelers Insurance Company Compensation..	\$1.27	
	O. D. ....	.21	2.08
WSLG-863387	The Travelers Insurance Company .....		.13
Total			2.21
Grand Total			\$246,126.56

“The aforesaid total premium of \$246,126.56 represents the earned premiums on a retrospective basis under War [104] Projects Insurance Rating Plan; that said figure is still subject to final adjustment.

“That the premium for workmen’s compensation and occupational disease as reported to the Industrial Accident Board of the State of Idaho and tax

paid on \$449,556.01 for the period July 1, 1942, to December 31, 1942, and that tax was paid on the amount of \$171,492.41 for the period January 1, 1943, to June 30, 1943, and that report was made to the Industrial Accident Board for the period July 1, 1943, to December 31, 1943, of return premiums in the sum of \$439,417.90 and that on February 26, 1943, the Travelers Insurance Company reported to the Director of Insurance and paid the 3 per cent tax to him on accident, health, personal liability, and workmen's compensation in the sum of \$558,994.21 for the year 1942, and that various reports were made to the Industrial Accident Board of the State of Idaho showing for the years 1942, 1943 and 1944 premiums of \$727,524.30 less return of \$439,417.90. Tax was paid semi-annually to the Industrial Accident Board and annually to the Bureau of Insurance upon the basis of the amount of premiums for the period reported. No refund of tax has been made by the Industrial Accident Board or by the Bureau of Insurance of the State of Idaho on account of the return of [105] premiums reported by the defendants. No action has been commenced by the defendants nor have any court proceedings been taken by the defendants therein since the tax payments were made. The defendants' letter of February 8, 1944, to the Industrial Accident Board informed the Board of the amount of return of premium in the sum of \$439,417.90 for the period of July 1, 1943, to December 31, 1943, and requested the Board to advise the Company of

the procedure to follow in order to obtain the tax refund of \$4391.18. The defendants' letter of February 28, 1944, to the Director of Insurance informed the Director of the amount of return of premium in the sum of \$273,871.95 for the year of 1943 and requested the Director to advise the defendants of the procedure to follow in order to obtain the tax refund of \$8216.16.

“II.

“The earned premium under policy HPS-908557 was as follows: The Travelers Insurance Company \$11.10, the Travelers Indemnity Company \$3.43; that the earned premium on Policy UB-908556 earned by the Travelers Insurance Company was \$99.45.

“III.

Total premium paid by the Walter Butler Company to The Travelers on Policies issued under the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement

Deposit Premium	\$ 47,519.66	
Total Audit Premium (including Washington)	647,323.06	
	<hr/>	
	694,842.72	
Less Washington Premium..	18.85	
	<hr/>	
		\$694,823.87
Total Amount of Return Premium (Subject to final adjustment)		448,699.52
Net amount of Earned Premium (Idaho only)		\$246,124.35

Amount of Premium on which Taxes were paid on Policies issued under the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan endorsement

	Premiums on Which Taxes Were Paid	Refund Claimed	Total Premium as figured under War Projects Insurance Rating Plan
(1) Workmen's Com- pensation	\$535,599.84	\$291,071.36	\$244,528.48
(2) Automobile Bodily Injury	1,238.24	117.05	1,121.19
(3) Liability other than automobile	31,246.08	26,339.59	4,906.49
(4) Automobile Prop- erty Damage (Travelers Indem- nity Co.)	3,281.38	.....	3,281.38
	<hr/>	<hr/>	<hr/>
	\$571,365.54	\$317,528.00	
The Travelers Insurance Co. Items (1), (2), and (3).....		\$250,556.16	
The Travelers Indemnity Co. Item (4)		3,281.38	
		<hr/>	
Total Premiums			\$253,837.54*

*Defendants assert that a further sum is to be refunded so as to make the earned premium paid and payable on which the Idaho premium taxes must be paid \$246,124.35.

Premiums and Taxes on the UB and HPS policies not issued under the War Projects Insurance Rating Plan

	Premium	*Taxes 3%	**Taxes 1%
UB-908556			
Workmen's Compensation	\$99.45	\$2.98	\$.99
HPS-908556			
Bodily Injury Liability.....	11.10	.33	.....
Property Damage Liability.....	3.43	.10	.....

*Taxes paid to Idaho Insurance Department.

**Taxes paid to Industrial Accident Board.

“IV.

“It Is Stipulated that the written data furnished plaintiff by the defendants on plaintiff’s motion for inspection, or duplicates thereof, or the instruments [108] from which the copies were made, may be offered in evidence by any party hereto as genuine and in lieu of the original, subject to any other objection as to admissibility.

“It Is Further Stipulated that in the event the written data furnished plaintiff on plaintiff’s motion for inspection, or duplicates thereof, or the copies from which they were made, are admitted in evidence a written memorandum explaining how said admitted documents may be used to show the premiums paid may be admitted in evidence. The witness preparing the written statement to be present and subject to plaintiff’s examination thereon.

“V.

“It Is Further Stipulated that the War Projects Insurance Rating Plan for Cost-Plus-Fixed-Fee Contract, a copy of which has heretofore been served upon the plaintiff in response to plaintiff’s request for admission, is true and genuine, and that said plan may be offered in evidence, subject to plaintiff’s right to object as to the legality of the use of said plan in the State of Idaho and as to the War Projects Insurance Rating Plan Endorsement being a part of the policies in question. It Is Further Stipulated that said plan was applied as to Policies Nos. WUB 863386, WSLG 863387 [109] and WSLA 863388 under the Walter Butler con-

tract involved herein for the construction of the Farragut Naval Station at or near Bayview, Idaho.

“VI.

“The audited interim premiums on the policies involved herein in the amount of \$694,823.87 was actually paid to the defendants on account of the policies in controversy and that the defendants returned to Walter Butler Company the sum of \$440,-985.33, under provisions of the War Projects Insurance Rating Plan claimed to be a part of the three policies first described in Paragraph I. That no court action was ever commenced against the State of Idaho to recover tax paid on returned premiums.

“VII.

“It Is Stipulated that the defendants, and each of them, are insurance companies incorporated under the laws of Connecticut, with their home office at Hartford, Connecticut, and engaged in the insurance business; that each of said companies at all times described in the pleadings herein was licensed to do business in the State of Idaho.

“VIII.

“It Is Further Stipulated that Exhibit I attached to the defendants' Answer is a true and correct copy of a letter written by the defendants to Eugene H. Ware Co. on October 21, 1936, and received and accepted by Eugene H. Ware Co. on or about said date. That the original of said letter may be offered in evidence, or a copy thereof may be offered in evidence without production of the original, sub-

ject to any objections as to its admissibility other than its genuineness and other than the fact that it is a copy.

“IX.

“Nothing in this stipulation shall prevent either party from offering evidence otherwise admissible or explanatory of the matters stipulated herein not inconsistent with this stipulation.

“Dated this 29th day of April, 1947.

“Ezra R. Whitla, E. T. Knudson, Attorneys for Plaintiff; residence and P. O. Address: Coeur d’Alene, Idaho.

“Wm. S. Hawkins, Coeur d’Alene, Idaho; C. H. Potts, by Wm. S. Hawkins, Coeur d’Alene, Idaho; Charles Horowitz, 2000 Northern Life Tower, Seattle 1, Washington, Attorneys for Defendants.

“Of counsel: Preston, Thorgrimson, Horowitz & Turner, 2000 Northern Life Tower, Seattle 1, Washington.

“(Filed: U. S. District Court, District of Idaho, at 9:40 a.m., April 30, 1947, Ed M. Bryan, Clerk, by Betty Hill, Deputy.)”

Mr. Whitla: I am offering at this time Plaintiff’s Exhibit No. 1, which is the policy of insurance, with all the riders and attachments, as furnished to us by the defendants in this case. As Plaintiff’s Exhibit No. 1, we offer in evidence the policy of the Travelers Insurance Company of Hartford, Connecticut, No. WUB-863386, issued to Walter Butler Company, and I offer it, excepting therefrom, the certificate as to what it contains, which is put on the policy by the Assistant Secretary, apparently.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 1, for purposes of identification.) [112]

Mr. Horowitz: Your Honor will recall that we furnished copies of all documents, including copies of the policies. These copies were sent because we didn't have the originals. Many of the endorsements we can't locate. These copies were made from our original records, and are prepared to show the condition of the policy exactly. Now, if counsel is going to offer a copy of the physical instrument and leave off the Secretary's certificate showing what the instrument is, I will object. I don't quite know how your Honor wants to proceed with this, but if counsel wants to offer a part of these, then of course I will offer the balance.

The Court: It seems that the policy is what he asked for in his request to the defendants, and the policy would be what he is entitled to.

Mr. Whitla: And what I am offering, your Honor, is the policy with the endorsement specified on the face of the policy, and not what is in the certificate of the Assistant Secretary of the Company, and I am not offering the policy including that certificate.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 1, so marked for identification, was admitted in evidence.)

Mr. Whitla: This includes the policy, and also has [113] reference to the endorsements, but does

not include the insurance ratings. That is not described in the policy or included here. These are marked as Exhibits 1, 1-A, 1-B, 1-C and 1-D.

(Whereupon documents referred to were marked Plaintiff's Exhibits 1-A, 1-B, 1-C and 1-D for identification.)

Mr. Whitla: We now offer them in evidence. They are, again, 1, 1-A, 1-B, 1-C, and 1-D, inclusive.

The Court: They may be admitted.

(Whereupon Plaintiff's Exhibits 1-A, 1-B, 1-C and 1-D, for identification, were admitted in evidence.)

Mr. Whitla: I now have here a file of the report to the Industrial Accident Board. It begins with sheet which has been marked No. 40, and goes to sheet marked No. 62. I want to have this particular sheet, which is marked 52, marked as Plaintiff's Exhibit No. 2, and I will offer that in evidence.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 2, for purposes of identification.)

Mr. Whitla: It is simply the one sheet, 52.

The Court: Is there any objection?

Mr. Horowitz: No objection.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 2, for identification, was admitted in evidence.) [114]

Mr. Whitla: This is the return of the company to the Industrial Accident Board for the period

of from July 1st, 1942, ending December 31st, 1942, and it shows a collection of premiums of \$449,-556.01, and it shows the amount due by computation in multiplying the net amount collected by the rate of one per cent, and shows the amount due to the Industrial Accident Fund of \$4,495.56. That is the amount of taxes due the fund. We offer this in evidence as Plaintiff's Exhibit No. 2.

The Court: I think it was already admitted.

Mr. Whitla: We offer at this time as Plaintiff's Exhibit No. 3, being page No. 36 of the report of the Industrial Accident Board for the six months period beginning January 1st, 1943, and ending June 30th, 1943. It shows the net premium collected on Workmen's Compensation Insurance in the State of Idaho of \$171,492.41, and the amount of taxes shown on that report is \$1,714.92.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 3, for purposes of identification.)

The Court: Do you have any objection to this?

Mr. Horowitz: No objection.

The Court: It may be admitted.

(Whereupon document referred to as Plaintiff's Exhibit 3, was admitted in evidence.)

Mr. Whitla: Now, I offer this in evidence. It is an instrument marked as Plaintiff's Exhibit No. 4. It is a statement of account furnished to us by the defendants in this case, showing premiums collected at the regular rate—

Mr. Horowitz (Interposing): We object to that statement made by counsel of what it shows. We have no objection to the instrument itself.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 4, for identification.)

Mr. Whitla: It shows the statutory earned premiums.

Mr. Horowitz: Whatever it shows is all right, but we object to counsel making a statement as to what it shows.

Mr. Whitla: We offer it in evidence for that purpose—for the purpose of showing the statutory earned premiums.

Mr. Horowitz: I think when it is admitted, if it is admitted by the Court, it is in the record for what it shows.

The Court: Yes; that is true. It may be admitted with that understanding.

(Whereupon Plaintiff's Exhibit No. 4 for identification, was admitted in evidence.)

Mr. Whitla: That is furnished to us as a statement [116] of account. We don't agree to some of the figures, but it is the instrument furnished to us, and we do not agree in some instances with what they have characterized these figures.

Mr. Horowitz: I have for this purpose what can be called a superseding audit.

Mr. Whitla: We will call Mr. Nelson at this time.

OSCAR W. NELSON

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Whitla:

Q. Where do you reside, Mr. Nelson?

A. 721 Empire Avenue, Coeur d'Alene.

Q. How long have you resided in Coeur d'Alene?

A. For forty-two years.

Q. And what is your occupation?

A. Insurance business.

Q. How long have you been engaged in that business?

A. Twenty-three years.

Q. Do you know what the regular full commission is on Workmen's Compensation Insurance in the state of Idaho, in this vicinity?

Mr. Horowitz: We object to that as [117] being utterly immaterial.

The Court: I think the objection is well taken, but I will permit him to answer subject to your objection, with the understanding that the Court will make final determination later. In my judgment now, it is not a question of what the rate was, or should be, or anything else, except how much was paid in commissions, as the statute provides that any commission paid outside the state of Idaho, or, rather, that commissions shall be paid to the resident agent for any business written outside the state of Idaho. The statute provides that it shall be unlawful for any foreign insurance company doing business in this state to make, write, place or

(Testimony of Oscar W. Nelson.)

cause to be made, written or placed in this state any policy, bond, duplicate policy, or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident situated or located in this state, unless done through an agent who is a resident of this state legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued except policies of life insurance, and shall receive the full commission when the premium is paid, except when said policy is made, written or placed by a licensed broker, in which event the counter signing agent shall receive a commission of not less than five per cent [118] of the premium paid. Now, he is entitled to all of the commission unless a broker submits it to him, and then he gets no less than five per cent of the premium paid. I can't see the materiality of this.

Mr. Whitla: I offer this to show what the full commission is.

The Court: I will permit him to answer, but as I say, as yet I don't see the materiality of it.

Q. (By Mr. Whitla, continuing): What is that commission?

A. You mean on compensation insurance?

Q. Yes.

A. Usual practice is the standard rate of commission, ten per cent to the local agent.

Q. And on liability policies, what is the commission?

(Testimony of Oscar W. Nelson.)

Mr. Horowitz: We make the same objection to all of this line of testimony, if that is agreeable?

Mr. Whitla: That is agreeable with us.

The Court: The same ruling.

A. The local agent on general liability, it is from seventeen and a half to twenty-five per cent.

Mr. Whitla: That is all. You may examine.

Cross-Examination

By Mr. Horowitz:

Q. If there is a contract with the producing agent, [119] of course that would govern?

A. I think so.

Q. What you have been testifying to is the commission to the agent who produces the business?

A. What the local agent is paid.

Q. The commission to the agent who secures the business?

A. That is the local agent's commission, the rest is governed by law.

Q. Your testimony is as to the commission paid to the agent who secures the business?

A. That is right; yes.

Q. Mr. Nelson, you have been testifying to the flat rate of commission and compensation, on general liability policies. Isn't it a fact that the rate of commission varies with the size of the policy, or risk, that it goes down as the size of the risk goes up?

A. That is true, to a certain extent, and it varies with the companies.

Q. Yes; that is true, but there is a standard that

(Testimony of Oscar W. Nelson.)

the higher the amount of insurance coverage, the lower the rate of commission?

A. Not in all instances.

Q. But that is true, there is that standard?

A. It could be. [120]

Q. Those things are regulated by contract?

A. I would say that the contract would govern.

Q. Mr. Nelson, isn't it the customary practice for insurance commissions to be regulated by contract? A. Yes, sir.

Mr. Horowitz: That is all.

Mr. Whitla: That is all.

(Witness excused.)

Mr. Whitla: Now, I wonder how I can identify this?

Mr. Horowitz: I think you may identify that as the cashiers file.

Mr. Whitla: Then I would like to have it marked for identification.

Mr. Hawkins: I wonder if for the purpose of identification the Clerk would write on that the words, "Cashiers File?"

Mr. Whitla: That is agreeable with us.

(Whereupon the document was so marked.)

Mr. Whitla: From the cashier's file now I *will* *that* there be marked the pages I indicate as 5-A, 5-B, 5-C, 5-D, 5-E, 5-F, 5-G, 5-H, 5-I, 5-J, 5-K, 5-L, 5-M, 5-N, 5-O, 5-P, 5-Q, and 5-R?

(Whereupon above documents were marked Plaintiffs Exhibits 5-A to 5-R, inclusive.)

Mr. Whitla: And I will now offer in evidence the pages which have been marked by the Clerk 5-A to 5-R inclusive, Plaintiff's exhibits.

Mr. Horowitz: We have no objection. I would like to call your Honor's attention to the fact that the total of the reports which counsel has offered in evidence is exactly the amount shown by the stipulation.

Mr. Whitla: It does not show the dates of payments.

The Court: If there is no objection the exhibits will be admitted.

(Whereupon Plaintiff's exhibits 5-A to 5-R Inc., for identification were admitted in evidence.)

Mr. Whitla: The plaintiff rests.

Mr. Horowitz: Your Honor, I had not expected the plaintiff to rest quite so soon.

(Further statement by Mr. Horowitz.)

There are certain factual matter which no doubt will be placed in the record in this case, and we hope that your Honor will take out motion, which I shall presently make, under advisement, and I would like at this time to move for a dismissal on the following grounds:

1. That no cause of action for commissions, stated or proved, requiring discovery exists, in that there is no showing that Mr. Eugene H. Ware secured the proposals for [122] the insurance involved.

Second: That there is no proof that any special commission for Eugene H. Ware was fixed for the retrospective insurance involved, or that any premium or commission was paid to anyone for obtaining this insurance so far as this record is concerned;

Third: That the plaintiff is not entitled to commissions based on countersigning services rendered by virtue of Section 40-902, Idaho Code, Annotated, as amended by Chapter 61 of the Idaho Sessions Laws, 1939, in that there is no showing that the defendants did make, write, place, or cause to be placed, made or written in Idaho any policy or bond here involved so as to entitled plaintiff to commissions because the statute does not apply to policies and bonds issued to Walter Butler Company being negotiated and written outside of the State of Idaho, and there is no showing here that it was written inside the state of Idaho. There is no showing that Mr. Ware has not been paid his full commissions on policies secured by him, and no showing of any contract for the payment of commissions on countersigning. The contract, which is exhibit "A," on its face shows that no commission was to be paid for countersigning.

Fourth: That Section 40-902 does not confer a cause of action in favor of the countersigning agent, as distinguished [123] from a statutory penalty, if any there be, for any violation of the law.

Finally, that the statute upon which plaintiff relies, as disclosed by the complaint, particularly Section 40-902, is repugnant to the Fourteenth

Amendment, and unconstitutionally burdens interstate commerce.

The Court: Can you raise that last question here? That is the very matter which the Circuit Court of Appeals of this Circuit passed on.

Mr. Horowitz: I would like to present authorities on that matter.

The Court: I understand it is your request that the Court take this motion under advisement?

Mr. Horowitz: That is right, your Honor.

The Court: Very well. I will take it under advisement.

Mr. Horowitz: There was a request for admission under Rule 36 filed in this Court, and there were answers to those requests. Certain of those request were answered, others were either not answered, or denied, or set up affirmative matters. I don't know just how your Honor wishes to consider this matter, but for the purpose of determining whether we have an admission, my thought being that in order to get the evidence into the record it would be necessary to have [124] a ruling, and I would call your Honor's attention to Rule No. 36 of the Rules of Civil Procedure, Section "A," which provides: "Any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request, or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request, unless copies have already been furnished. Each

of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than ten days after service thereof or within such further time as the Court may allow on motion and notice, the parties to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested, or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters." Now, with that rule in mind, if the Court please, I would like to obtain a ruling as to the effect that certain admissions are made as requested under Rule 36. The requests for admission were filed in July, 1946, and the first question is, for an admission that "each of the following documents exhibited [125] with this request is genuine: checks signed by the Travelers Insurance Company in the sum of \$5.00 each on the Chase National Bank of the City of New York, Metropolitan Branch, payable to Eugene H. Ware Company and bearing endorsement of payee dated and numbered as follows," and then follows a series of numbers and amounts of checks. The answer which is given in what is designated "Reply to requests for admission under Rule 36," reads as follows: "1. Admits that the checks mentioned and described in paragraph one are genuine, but specifically denies that said checks were written or received in regard to any matter in controversy in this action, or that they have any reference to any matter in controversy in this action whatever."

Now, I think, your Honor, that the first part of the answer is in direct response to the request. The balance is not. And I would ask your Honor to rule whether Question 1. of our request has been admitted. That is the only portion I would like in evidence in connection with this matter.

The Court: I don't know what counsel has in mind. The question, "That each of the following documents exhibited with this request is genuine," and in the answer is the following, "Admits that the checks mentioned and described in paragraph one are genuine." It seems to me that the balance of the answer is not responsive to the [126] question.

Mr. Horowitz: I would like a ruling of the Court as to whether our request is admitted.

The Court: Yes; it is admitted to that extent, that the checks mentioned and described in paragraph one are genuine. So that you will definitely understand, the Court rules that the balance is surplusage.

Mr. Horowitz: And the second item in the requests is, "2. That each of the following statements is true: 2-A; That Walter Butler Company is and at all times mentioned in the answer was, a corporation organized under and pursuant to the laws of Minnesota. And to that request reads as follows—and I will ask your Honor to rule that the answer to that request, "That plaintiff is informed that Walter Butler Company which built Farragut Naval Training Station in the County of Kootenai, Idaho, was a corporation of the state of Minne-

sota," stands as an admission, and I don't offer that answer insofar as it departs from that admission.

The Court: Yes; that's is correct, no doubt.

Mr. Horowitz: Now, as to our request "M" on page three of our requests, "That Eugene H. Ware did not secure the proposal for insurance coverage contained in policies No. WUB-863386, No. WSLG-863387, No. WSLA-863388, No. HPS-908557, and No. UB-908556. That the proposals for insurance coverage contained in policies No. WUB-863386, No. WSLG-863387, and No. WSLA-863388 were obtained in New York [127] City, New York, through the New York City office of the Travelers." The answer to that request goes into other matters and states as follows: "Answering paragraph 'M' the plaintiff alleges that Eugene H. Ware Company solicited said business, but that he did not secure the proposals which were made in some manner unbeknown to him directly between the parties after he had initiated an attempt to get the business for the defendant." We offer our requests for admission, and ask your Honor to rule that our request has been admitted, but we do not offer that sentence which contains matters not responsive.

Mr. Whitla: I think we have properly answered the requests. I think we are entitled to put the facts in, and not to make merely a bald statement.

The Court: I don't have that request "M"—I will find it here in a moment though—yes; here it is, and I might say that I am inclined to think the Circuit Court of Appeals treated this as a case in which they did not secure the insurance. I believe

that they have admitted the statement as outlined in your request, but they have qualified it to a certain extent. I think possibly the qualification should be allowed to stand.

Mr. Horowitz: I ask leave to withdraw that.

The Court: Yes; you may withdraw it. [128]

Mr. Horowitz: Paragraph "X" of the request on page five reads: "That the original of the letter referred to in sub-paragraph twelve is now in the possession of the plaintiff," copy of which is attached to the answer and permitted to come in over their objection. The answer to the request admits Paragraph "X" subdivision two. I would like to have that in the record.

The Court: It says so. There can be no objection to that.

Mr. Whitla: We stipulate what the letter contains.

(Statement by Mr. Horowitz as to the evidence and the position of the defendants.)

Mr. Horowitz: Now, as to these checks payable to Eugene Ware Company, I think we might dispose of those checks now. I would like this check dated October 22nd, 1936—that is the first check—and the last one is dated May 11th, 1942, there being sixty-eight checks, and these checks are the subject matter here. They are offered in evidence at this time and marked as Defendants' Exhibit No. 6.

(Whereupon documents referred to were marked Defendants' Exhibit 6 for purposes of identification.)

The Court: Is there any objection?

Mr. Whitla: We shall object to that as incompetent, irrelevant and immaterial, if it is attempted to be used for [129] the purpose of showing, or attempting to show, that Mr. Ware received compensation, and under the statute it is void, and it is in contravention of the section of the statute which provides that it shall be unlawful to write any policy, and that any policy written in Idaho will be void unless countersigned by a resident agent.

The Court: Of course, they would be entitled to credit for the amount of checks paid as against any commission due Mr. Ware.

Mr. Horowitz: That was for other services than commissions.

The Court: I will admit the exhibit.

(Whereupon Defendant's Exhibit No. 6 marked for identification, was admitted in evidence.)

Mr. Horowitz: I wish to offer Exhibit No. 7 now, being a letter dated October 21, 1936, addressed to Eugene H. Ware Company, 104 Fourth Street, Coeur d'Alene, Idaho, and it is referred to in the stipulation.

(Whereupon document referred to was marked Defendant's Exhibit 7 for purposes of identification.)

Mr. Whitla: As to that we object as being absolutely in contravention of the laws of the state of Idaho, if it is intended to be introduced by the defendants. It is a void transaction, void under the

laws of Idaho, and against [130] the public policy of Idaho. Section 40-902 of the Idaho Code, as amended by the 1939 Session Laws, at page 109, and Section 40-1201 prohibit the writing of any policy that does not conform to the laws of the state of Idaho, and provides that any regulations or any writing or stipulation of the policy which is void, then the statutes of Idaho shall be read into the policy and considered to govern. I think the rule is well established that where the statute of the state lays down a public policy it must be followed, and any attempt or agreement in controvention of that statute is void, and I have authorities to offer on that.

The Court: I am inclined to think, although I have not read that letter—I think the general statement made by counsel perhaps is correct. However, I will reserve my ruling on this matter, and we will proceed at this time, and for the present it may be admitted.

(Whereupon Defendant's Exhibit 7, for identification, was admitted in evidence.)

Mr. Horowitz: Now, in reference to the exhibits that have been offered, counsel has a number of pages which he has offered in one of the exhibits—I believe it was the first exhibit. I desire to offer the entire exhibit. I wonder how your Honor wishes to have that done? Shall I have the balance of the pages numbered, or would it be sufficient if I offer the [131] balance of this exhibit?

The Court: I think that would be sufficient. The

Clerk can designate the balance of the exhibit, and give it a number.

(Whereupon document referred to was marked Defendants' Exhibit 8, for purposes of identification.)

Mr. Horowitz: At this time I offer in evidence copies of the balance of the endorsements, which appear in Plaintiff's Exhibit No. 1, my offer being the balance of the documents referred to in that exhibit. My offer would refer to, and is, the balance of the documents other than those identified as Plaintiff's Exhibits No. 1, 1-A, 1-B, 1-C and 1-D.

The Court: What number will be given that, Mr. Clerk?

The Clerk: Defendant's Exhibit No. 8.

Mr. Whitla: We object to these. A large number of the exhibits, or documents, bear date long after the policy in question was cancelled. We object to it as incompetent, irrelevant and immaterial. The provision in this Exhibit 1-B is that the policy was cancelled by the action of the parties in accordance with the terms of the contract on July 30th, 1943, and a lot of these exhibits are dated after that time. [132]

The Court: How is the Court going to segregate all this without having each item pointed out, that is, each of the items that you objected to.

Mr. Whitla: My objection goes to all of the exhibit following our exhibit 1-D.

The Court: If we can admit this at this time, and then you can point out in your argument and

brief the parts that you consider objectionable, as being immaterial.

Mr. Whitla: That will be agreeable.

The Court: Then it is admitted, without objection, except the parts considered immaterial, and they will be pointed out in the arguments and briefs of counsel.

(Whereupon Defendants' Exhibit 8 for identification, was admitted in evidence.)

Mr. Horowitz: At this time I offer in evidence Defendants' Exhibit No. 9, which is an audit that was furnished here in connection with motion for inspection of documents.

(Whereupon document referred to was marked Defendants' Exhibit No. 9, for purposes of identification.)

Mr. Whitla: Your Honor, I object to this. Counsel stated that this is superseded by a complete audit, which was our exhibit No. 4. This is a part of the time for exactly the same work, except that Exhibit No. 4 is a complete audit, bringing down to the time the work was finished, and this would only [133] tend to confuse the matter.

The Court: There are no other objections, except that it contains some of the matters?

Mr. Horiwitz: These are the documents, or copies of the documents we furnished you, and we want to introduce these things all in evidence.

The Court: It may be admitted, subject to your objection, Mr. Whitla.

(Whereupon Defendants' Exhibit No. 9 for identification, was admitted in evidence.)

Mr. Horowitz: At this time I offer exhibit No. 10, which is a preliminary computation of earned premiums which was furnished to counsel.

(Whereupon document referred to was marked Defendants' Exhibit No. 10 for purposes of identification.)

Mr. Whitla: I object to it as incompetent, irrelevant and immaterial. The fact that the same thing has been furnished to me does not make it admissible. It must be admissible for some other reason than that. The simple fact that I asked for some of these things in my requests for documents to inspect them, does not mean that the defendants can put everything in evidence. We stipulated as to the amounts shown on these, and how they have been computed. Now, I cannot see why we should encumber the record with a hundred or so [134] pages of a document of this kind. I *think* it will have any tendency to enlighten the Court.

The Court: Mr. Whitla, you simply argue the reasons it should not be admitted. Will you just state the grounds of your objection?

Mr. Whitla: Yes, your Honor. On the ground that it is incompetent, irrelevant and immaterial, and encumbering the record, and that we have stipulated to the facts that are shown in the exhibit.

The Court: You don't object to the way in which it is prepared?

Mr. Whitla: I don't know how it was prepared.

The Court: The possibilities are that the objection stated in the record is not well taken, and I take it, Mr. Horowitz, you have the witness here who prepared this exhibit?

Mr. Horowitz: We have a witness to explain all of these exhibits.

The Court: With the understanding that it will be connected up, I will admit it.

(Whereupon Defendants' Exhibit No. 10 marked for identification, was admitted in evidence.)

Mr. Horowitz: At this time I offer in evidence Defendants' Exhibit No. 11, which is a computation prepared subsequent to the preliminary computation. [135]

Mr. Whitla: We object to this. It is something that was prepared entirely after this action was commenced. The title page is dated October 23rd, 1945. It is wholly incompetent, irrelevant and immaterial, in view of the fact that we have stipulated what the figures are.

The Court: It may be admitted, subject to being connected up.

(Whereupon Plaintiff's Exhibit 11 for identification was admitted in evidence.)

Mr. Horowitz: Mr. Clerk, do you have page No. 24 of the photostats among the things Mr. Whitla handed to you?

(Whereupon, the Clerk produced all exhibits.)

Mr. Horowitz: At this time we offer Defendants' Exhibit No. 12, and also the same type of Exhibit which is marked Defendants' Exhibit 13. These are two letters referred to in the stipulation, and the offer is explanatory to the stipulation.

(Whereupon Defendants' Exhibits 12 and 13, being the documents referred to, were marked.)

Mr. Whitla: We make this objection: That is incompetent, irrelevant and immaterial. They simply write a letter to the effect that they claim some tax refund, and ask what to do about it. Nothing was done, and of course the time for approving it, or for taking any proceedings to recover [136] is now past.

Mr. Horowitz: Counsel has included reference to these letters. Now, in order to show what the letters are I offer them, simply as explanatory of the stipulation.

The Court: They may be admitted for that purpose.

(Being letter dated February 28, 1944, addressed to the Director of Insurance, Boise, Idaho, signed "C. P. Osgood, Secretary.")

(Whereupon Defendants' Exhibits 12 and 13, for identification, were admitted in evidence.)

Mr. Horowitz: That included Exhibit No. 13?

The Court: Yes; it was admitted also.

(Exhibit No. 13 being letter dated February 8th, 1944, addressed to the Industrial Accident

Board, State of Idaho, Boise, Idaho, and signed, "C. P. Osgood, Secretary.")

Mr. Horowitz: I now offer Defendants' Exhibit No. 14, No. 15, and No. 16, being three photostatic copies, or, rather, photostatic copies of three pages of a letter dated February 2nd, 1943, being the letter referred to in Exhibit No. 12, where it says, "For more complete details in regard to this subject, please refer to attached copy of my letter written under date of February 2nd, 1943, to the Idaho Industrial Accident Board." Exhibit No. 12 [137] does not have that copy attached, and I am furnishing it in this exhibit. These three sheets, a part of a photostatic exhibit, bear sheet numbers 49, 50 and 51, and bear the Clerk's number now of 14, 15 and 16.

(Whereupon documents referred to were marked Defendants' Exhibits 14, 15 and 16, for identification.)

Mr. Whitla: We object to this as being only one side of the correspondence. I think you should have both sides of the correspondence.

Mr. Horowitz: I would be perfectly willing to put it all in.

The Court: Then you may go ahead and place it all in evidence, to satisfy the objection, and it may be admitted with the understanding that if there is any other correspondence or any other letters, you may introduce them. I think, too, that the letter which this letter was answering should be admitted, along with the letter you have intro-

duced in evidence. At this time we will recess until two o'clock.

April 30th, 1947. 2:00 P.M.

Mr. Horowitz: If the Court please, I want to be certain about the ruling made as to the exhibits that were last introduced before the noon recess.

The Court: The Court ruled that if the other letter was placed in evidence, then they would also be admitted. It may be possible that the Court can determine something from these exhibits, but it seems to me now that there is one question, and only one question, and these exhibits are all more or less confusing, but we will proceed. However, it seems to the Court that the statutes provide that the agent is entitled to the full commission when the premium is paid. The question is as to what commission was paid. At the present time I don't see where the other part of the statute has any bearing on this, but possibly it may have, and I want you to understand that the Court is not prejudging this matter now. I gathered from counsel for the plaintiff that it is their contention that the statute cannot be waived by a contract or an agreement. If that is true, then there is only one question, and that is the question of commission, what commission was paid outside the state of Idaho, if any. Whatever amount is, under that theory that the statute is mandatory, and the Court has already said,—that is, the Court of Appeals had said that the statute is constitutional. If this is all true, then that amount would be due to the plaintiff here under

their theory. At the present time I don't see where any of these exhibits are going to be very helpful to the Court, but I want to give you all the opportunity possible [139] to present your various theories of this case.

Mr. Horowitz: I thoroughly appreciate the Court's position because of the stipulation which is rather confusing, and because of certain exhibits offered in evidence and I don't want to do anything to make a case of confusion worse confounded.

The Court: It certainly is getting to that state very fast.

Mr. Horowitz: Mr. Whitla, I wonder if you will indicate to me just what you wish me to introduce?

Mr. Whitla: I have the other letter here.

Mr. Horowitz: May I say to your Honor that this letter that I offered as Defendants' Exhibit 14, 15 and 16 refers to the letter dated August 10th, 1942, and I will say to Mr. Whitla that I certainly have no objection to that letter going in.

Mr. Whitla: Perhaps I had better wait until rebuttal to introduce this.

The Court: It may be admitted with that understanding, that it refers to one letter only.

(Whereupon Defendants' Exhibits 14, 15 and 16, for identification, were admitted in evidence.)

Mr. Horowitz: I now offer in evidence Defendants' Exhibit No. 17, which is a letter dated August 30, 1943. It [140] is taken from the cashier's file, or rather, is a part of the cashier's file introduced here.

(Whereupon document referred to was marked Defendants' Exhibit 17 for purposes of identification.)

Mr. Whitla: We object to it as incompetent, irrelevant and immaterial. It is a letter concerning a rebate which is prohibited by statute.

The Court: Isn't that covered by your stipulation,—I will admit the exhibit at this time, and it will perhaps save time.

(Whereupon Defendants' Exhibit 17 was admitted in evidence, being letter dated August 30th, 1943, addressed to the Acme Brokerage Corp. 20 Pine St., New York, and signed by A. W. Terhune, Branch Accountant.)

Mr. Horowitz: At this time we will call Mr. Peterson as our first witness.

GEORGE E. PETERSON

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Horowitz:

Q. Will you tell the Court where you reside?

A. I reside at 27 Van Buren Avenue, West Hartford, Connecticut.

Q. And your age? [141] A. Sixty-seven.

Q. Your occupation?

A. I am secretary of the Compensation and Liability Department of the Travelers Insurance Companies of Hartford, Connecticut.

(Testimony of George E. Peterson.)

Q. As secretary of those departments what is generally your duties?

A. My duties consist of setting up rules and regulations in regard to acceptance or rejection of the casualty lines that are offered to us, supervising the assistant secretaries, the underwriters, and the activities of the underwriters and their assistants.

Q. So that we can get some idea of the coverage which you supervise, will you tell the Court how much of the insurance risks that are written by the Travelers lines come under your supervision?

A. Well, in this particular period, 1942, I imagine we had some seventy million dollars premiums. I remember the record distinctly applying to 1946. There were paid premiums exceeding one hundred million dollars for that year.

Q. How many insurance policies would that premium income represent?

A. Well, something less than one million policies.

Q. What area is covered by those risks? [142]

A. Every state of the nation and Washington, D. C., Canada, Alaska, and there is some operation outside of the country.

Q. With reference to the character of the rating used, as you have stated, as between the prospective and the retrospective ratings, they come under your supervision?

Mr. Whitla: We object to this as incompetent, irrelevant and immaterial.

The Court: He may answer.

(Testimony of George E. Peterson.)

A. I had supervision of the retrospective and the prospective ratings.

Q. Will you define the prospective ratings?

A. The prospective risks are where the premium rate is determined in advance. The company takes on a risk by getting a listing of the risk, and no adjustment on the policy is made by reason of good or adverse experience, and in that connection with the retrospective rating it is different. You establish the factor whereby the risk enjoys the benefit of the experience that comes, or occurs, during the pendency of the policy, and of course it adversely affects them if the experience is adverse.

Q. In the event that the loss experience is favorable in view of the premium paid what happens in that case?

A. There is a plan worked out under the policy indicating [143] as to what audit calculations shall be made. If it develops that there is a premium payment in excess of that, then the premium is returned to the policy holder. If the experience is adverse and there is a premium due the company it is paid by the assured.

Q. Is the retrospective rating a common type of rating? A. Yes, sir.

Q. Is it rather universally used?

A. Yes, it is used by a majority of the states, and has been for more than ten years. It is accepted in more and more states.

Q. I call your attention to the "Comprehensive

(Testimony of George E. Peterson.)

Plan," sometimes known as the War Projects Rating Plan, are you familiar with that?

A. Yes, sir.

Q. Do you have supervision of risks written under that plan?

A. I do with the Travelers companies.

Q. Is the War Projects Rating Plan, or Comprehensive Plan, a prospective or retrospective plan of insurance?

Mr. Whitla: We object to this. It is entirely immaterial. We have the plan in evidence.

The Court: He may answer.

A. It is definitely retrospective. [144]

Q. How much coverage did you supervise during the years when that plan was in use?

A. The total standard premium of War Projects Rating Plan business represents some ninety-seven million dollars in the Travelers Companies during that period.

Q. What area was covered by that type?

A. It covered some thirty-four states, the District of Columbia, Alaska,—that was on the Alcan Highway,—the islands of the Carribean, Newfoundland, and some in Iran and Irak; some in Central America, and I think one in South America.

Q. In connection with what type of contract, was that plan used?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial.

The Court: I think it is, but he may go ahead.

A. It had application to the fixed fee, and cost

(Testimony of George E. Peterson.)

plus contracts entered by the Government during the period of the war, for the building of factories of various kinds, of munition plants, navy yards and other facilities.

Q. What was the occasion for the use of that plan?

A. It goes back to the start of the war. Prior to the adoption of this Projects Rating Plan,—

Mr. Whitla (Interposing): That is entirely immaterial. [145]

The Court: I think it probably has nothing to do with it, but he may go ahead.

A. Prior to the time this plan was adopted, various Government agencies that had power to let contracts with individuals who were interested in insurance for the workmen, or public liability insurance, were compelled by an edict in Washington, or by an act of Congress—

Mr. Whitla (Interposing): I object to this. It is purely a conclusion of this witness as to what Congress—

The Court: The Court will not consider what this witness says the law is. He may state what he knows.

A. They had to get four bids from four different carriers without distinction as to the qualifications of those carriers, and it was necessary to assign it to the lowest bidder, and it was apparent that in order to make available all of the insurance facilities to the United States—this was recognized by the War Department, first—

(Testimony of George E. Peterson.)

Mr. Whitla (Interposing): I object to this as incompetent, irrelevant and immaterial. It seems to me that this is not evidence at all. It is not a subject that we could offer any evidence on to disprove——

The Court: That is correct. He can testify as to the facts, just what he knows.

Q. (Mr. Horowitz, continuing): In view of the experience [146] that you had in the use of this plan, what was the function that the plain performed in connection with fixed fee contracts?

A. Its function was to procure to the Government insurance at the lowest possible cost, and also to make available all the facilities of the insurance industry during the war.

Q. Prior to the adoption of that plan, was it possible for the Government to take advantage of all of the insurance facilities that were available?

A. No; it was not.

Q. What could it take advantage of?

A. It was on the lowest bid basis, and it would all go to the non-stock companies.

Q. Why?

A. Because of the method of calculating the acquisition cost.

Q. You mean that mutual companies didn't pay any commission? A. Yes, sir.

Q. What effect did that have as to the stock companies?

A. Well, this plan put them on a parity and made them all available for this work.

(Testimony of George E. Peterson.)

Q. What was eliminated to make that possible?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial.

The Court: He may answer. [147]

A. The matter of paying commissions in connection with the premium, which was developed under the plan.

Q. In 1941 did the Navy publish a plan under which it would reimburse cost plus a fixed fee contractors in connection with the writing of insurance?

A. It did.

Q. After the promulgation of the plan did you have anything to do with the writing of insurance under that plan?

A. Yes, sir. In addition to my duty, I was also appointed on a committee which was charged to administer this plan and work out rules and regulations.

Q. Did you have occasion to consult with Government officials on this matter?

A. Yes. We couldn't even hold a meeting without various agencies and departments, or representatives of departments being present, and participating in the meetings.

Q. I hand you what has been marked as Defendants' Exhibit 18 for identification, and I call your attention to the sub-exhibits contained in that, known as exhibits "C" and "D," and I will ask you to state if that is the plan to which you testified was published?

(Testimony of George E. Peterson.)

(Whereupon, document referred to was marked Defendants' Exhibit 18 for purposes of identification.)

A. That is the plan; yes, sir. [148]

Q. Now, directing your attention to the three policies in suit here, will you please advise where the proposal originated for the first three policies—they are number WUB-863386, number WSLG-863387 and number WSLA-863388?

A. Those are the numbers of the policies under the War Projects Rating Plan?

Q. Yes.

A. They are requests that first came to our 55 Johns Street Office at New York from a concern by the name of the Acme Brokerage Corporation. The inquiry was directed to the assistant manager, George McGrath. The inquiry was as to whether or not the Travelers Company would be interested in that coverage.

Q. And——

Mr. Whitla: If it was in writing that, of course, would be the best evidence.

Q. (Mr. Horowitz, continuing): Was that oral or in writing? A. Originally it was oral.

Q. Was it your duty to determine the status of those named in inquiries relative to insurance risks?

A. Yes, sir.

Q. Did you acquire knowledge concerning the inquire as to whether the Travelers Companies would issue this insurance? [149] A. Yes, sir.

(Testimony of George E. Peterson.)

Q. What was the knowledge that you acquired?

Mr. Whitla: Now, we object to this as hearsay of the worst kind. It is what someone else told someone else, and they told him. That would not be proper evidence.

The Court: Of course, I cannot tell yet what his answer would be. Do you wish to cross-examine him as to your objection, Mr. Whitla?

Mr. Whitla: Yes; I do.

Examination

By Mr. Whitla:

Q. You got all of that information from somebody else? A. Yes, sir.

Q. Someone else told you what someone had told them? A. Yes, sir.

Mr. Whitla: Now, we object to that as hearsay.

The Court: Sustained.

Direct Examination

(Resumed)

Q. (Mr. Horowitz, continuing): Was it any part of your duties at that time to pass upon insurance risk proposals?

A. Because of the newness of the Projects Rating Plan the secretary in charge of the department and I decided that I would personally, or that my assistant would personally, review every case of that character. That is the reason that [150] this case to me. I was in Washington at the time and they contacted me by telephone at Washington, and I contacted the Navy Department——

(Testimony of George E. Peterson.)

Q. (Interposing): What was the occasion of your contacting the officials in Washington in relation to this application?

A. There were certain details that I must have knowledge of: One was this cost plus contract. I wanted to know the size of the risk, and whether it was written on full medical or on ex-medical——

Q. (Interposing): From whom did you learn of the proposal? A. My assistant.

Q. Who was he? A. L. A. Kline.

Q. After you learned of the proposal—at that time he was where, Mr. Peterson?

A. He was at Hartford, Connecticut.

Q. Did you approve the risk?

A. I approved it for insurance.

Q. What authority did you give anyone as to the acceptance of the risk?

A. I advised the person in New York with whom contact was made by the Acme Brokerage Company that he could proceed with the issuance of the binder coverage.

Q. Was a binder issued? [151] A. It was.

Q. Where? At New York City.

Q. I hand you Exhibit No. 19 marked for identification and I will ask you if that is the binder.

(Whereupon, document referred to was marked Defendants' Exhibit 19 for purposes of identification.)

A. That is the binder.

Q. (Mr. Horowitz, continuing): To which you referred? A. Yes, sir.

(Testimony of George E. Peterson.)

Q. Is it an original copy?

A. No; it is a carbon copy of the original, having been made at the same time. The original was on top of this copy.

Q. To whom was the original delivered?

A. To the Acme Brokerage corporation.

Q. Is this a copy of the one delivered to them?

A. It is a duplicate.

Q. Whose original signature appears on that?

A. George McGrath's.

Q. Who is he?

A. The assistant manager of the 55 John Street office.

Q. Was this the binder that you authorized him to sign? A. It is.

Mr. Horowitz: I offer this binder in evidence.

The Court: Is there any objection?

Mr. Whitla: It is objected to as incompetent, irrelevant and immaterial. It appears that this was followed by a policy, and the policy is the real contract.

The Court: It will be admitted.

(Whereupon, Defendants' Exhibit No. 19 for identification was admitted in evidence.)

Q. (Mr. Horowitz, continuing): What is the function of this binder?

A. The binder is a contract of insurance in accordance with the policies described in the binder, and is contemplated to be replaced by the policies.

Q. When was that binder issued?

(Testimony of George E. Peterson.)

A. On or about April 28th, 1942.

Q. Does that binder indicate that it was written under the War Projects Rating Plan?

A. Yes, sir; it says so specifically.

Q. You mentioned the Acme Brokerage Company? A. Yes.

Q. What function did it have in this transaction?

A. They indicated that they were qualified as advisers.

Mr. Whitla: He testified that this had come to him from someone else.

Q. (Mr. Horowitz, continuing): Do you know whether the [153] Acme Brokerage Company was the adviser of the Walter Butler Company?

A. I know they were.

Q. In connection with the issuance of this binder and the writing of this contract, was any commission paid to anyone? A. No.

Q. Following the issuance of this binder, were policies made up? A. Yes, sir.

Q. Where? A. At Hartford, Connecticut.

Q. The policies that were made up were physically written at Hartford, too? A. Yes, sir.

Q. What happened to these policies?

A. After the policies were written they were sent to Mr. Ware in this town for countersignature.

Q. What happened after that?

A. There was——

Q. (Interposing): Where did they go?

A. They were sent to our New York office.

Q. In connection with the transmittal of these

(Testimony of George E. Peterson.)

policies do you have in your possession Mr. Ware's letter of transmittal? [154] A. Yes, sir.

Q. Please get it for me. Now, I hand you exhibit which has been marked Defendants' Exhibit No. 20, and I will ask you to state if that is the letter sent by Mr. Ware to the Travelers New York office?

(Whereupon document referred to was marked Defendants' Exhibit No. 20 for purposes of identification.)

A. That is the one I had reference to.

Mr. Horowitz: I offer it in evidence at this time, if the Court please.

Mr. Whitla: We have no objection to this.

The Court: It may be admitted.

(Whereupon, Defendants Exhibit No. 20 for identification was admitted, being letter dated May 25, 1942, addressed to the Travelers Insurance Company, 55 John Street, N. Y., and is signed Eugene H. Ware Co., by E. Thomas.)

Q. (Mr. Horowitz, continuing): I now direct you to look at Exhibit marked No. 21, Defendants' Exhibit No. 21, and state what it is.

(Whereupon, document referred to was marked Defendants' Exhibit 21, for purposes of identification.)

A. That is information regarding the exchange of wires.

Q. By whom is it written?

A. Eugene H. Ware Company. [155]

(Testimony of George E. Peterson.)

Q. To whom is it addressed?

A. The Travelers, Hartford, Connecticut.

Q. Does it have reference to these policies?

A. Yes, sir; it says so.

Mr. Horowitz: I offer this in evidence.

Mr. Whitla: No objection at all.

The Court: It may be admitted.

(Whereupon, Plaintiffs' Exhibit 21 was admitted in evidence, being letter dated May 29, 1942, addressed to the Travelers, 9 Central Row, Hartford, Connecticut, attention Mr. H. W. Swartfiguer. It is signed by Eugene H. Ware Co., by E. Thomas.)

Q. (Mr. Horowitz, continuing): After the delivery of the policies to the Acme Brokerage Corporation at New York did the Travelers pay that company anything for any services? A. No.

Q. There has been introduced in evidence Plaintiff's Exhibit No. 1, 1-A, 1-B, 1-C and 1-D, and all of the remaining number of this exhibit collectively described as Defendants' Exhibit 8. I would like you to explain each of the instruments in that exhibit starting with the very first, state generally if those purport to be a copy of the instruments in connection with this policy? A. Yes, they are.

Q. Now, then, the balance of the endorsements—Plaintiff's Exhibit No. 1, just state what that is.

A. Travelers compensation insurance policy covering this risk.

(Testimony of George E. Peterson.)

Q. That is policy No. WUB-863386, that is the compensation policy? A. Yes, sir.

Q. And the next document, marked 1-A, that is what?

A. That is the Idaho statutory endorsement?

Q. And 1-B?

A. That is the provision for loss and expense. It is entitled "Loss and Expense Constants Endorsement," and there is also the notice of cancellation. There are two exhibits on this page marked 1-B.

Q. And 1-C, what is that?

A. That is the endorsement for the Workmen's Compensation and Employer's Liability policy.

Q. And 1-D, what is that?

A. That is also a general endorsement for workmen's compensation and Employer's liability policy.

Q. Was that a part of the policy issued in this case? A. Yes, sir; it was.

Mr. Whitla: I just want to call counsel's attention to the fact that this is different, apparently, from the [157] copy I have here.

(Whereupon, remarks were passed back and forth between counsel regarding the exhibit.)

Mr. Horowitz: It so happens we have another copy here, and we can check this, and I would suggest we substitute our copy for the copy the clerk has now, and they will contain everything that has—that our copy has.

Mr. Whitla: That is agreeable.

(Testimony of George E. Peterson.)

Q. (Mr. Horowitz, continuing): Now, I call your attention to the policies referred to in that endorsement, in line one? A. Yes.

Q. Now, then, Mr. Peterson, where else in this exhibit marked Exhibit 8 are the endorsements concerning the War Projects Rating Plan on the remaining two policies?

A. They are in a corresponding position in the back of the exhibit in connection with policies WSLG-863387 and similarly we have the War Projects Rating Endorsement for the automobile liability policy No. WSLA-863388.

Q. I call your attention to each of these two endorsements that you testified to last, to the reference under the heading of "Premium Adjustment," on page two of the general endorsements for the general liability policy. With reference to Policy No. WSLG-863387, I will ask you if that refers to War Projects Rating on the compensation policy?

A. Yes, sir; it does; in fact, it reads, "The premium for this policy is to be computed in accordance with the provisions of the War Projects Insurance Rating Plan Endorsement forming a part of policy No. WUB-863386."

Q. Now, look at the next endorsement in there and tell the Court if the same thing occurs there.

A. Yes, sir; it does. It ties to this compensation policy and gives the same number, WUB-863386.

Q. Does the issue date of the policy appear on each of the three policies?

(Testimony of George E. Peterson.)

A. The issue date of the policy itself?

Q. Does the issue date appear on the compensation policy? A. Yes, sir.

Q. And what is the date?

A. May 18th, 1942.

Q. And what is the issue date of the other, the second policy? A. May 18th, 1942.

Q. And on the third policy?

A. Yes; May 18th, 1942, also.

Q. Now, Mr. Peterson, just in summary, each of the three policies were issued on the same date and carry the same endorsements in regard to the War Projects Rating [159] Endorsement?

A. Yes, sir.

Q. I call your attention to the fact that that endorsement seems to be dated a later date than the policy?

A. There could be many reasons for it. You start out on a policy and there is always the intent—that was true with all these War Projects ratings. We were trying to work out a plan that would be uniform, and there were corrections to be made, and they followed the policies out. There is an error found and we change it and make it effective with the beginning of the policy.

Q. In other words, if there are changes to be made the endorsements are made at a later date than the initial issuance of the policy, but it dates back to the issue date of the policy?

A. Yes, sir; or it may be some other date.

Q. Whatever the date is, it is shown on the

(Testimony of George E. Peterson.)

endorsement? A. That is right.

Q. I call your attention to endorsement numbered 1721 which the clerk has marked for identification as "A," being endorsement No. 1721. Will you look at that and see if you can tell us what that has reference to?

A. Yes, sir. That has to do with allowing you to make assignments of the premium.

Q. Can you refer in that document to the instrument [160] which is in quotation marks, reading, "Agreement regarding premium payments under War Projects Insurance Rating Plan Endorsement"?

A. Yes, sir.

Q. Will you turn to that?

A. Here it is, right here (indicating).

Q. Now, will you look at the page marked "ID No. B," is that the instrument to which the endorsement that you testified a moment ago, which is identified as identification "A," refers?

A. Yes, sir.

Q. Tell us whether endorsement marked for identification "A" refers back to the Comprehensive Rating Plan, or this later instrument?

A. You mean the one that was on the policy?

Q. Does it refer only to this later endorsement marked "B"?

A. No, to the policy, too.

Q. This War Rating Plan was on the policy in the beginning?

A. Yes, sir.

Q. This is a later endorsement. Now, will you please tell the Court what agreement is referred to in endorsement marked "A"?

(Testimony of George E. Peterson.)

A. This in here amends the policy so that it makes this [161] applicable to the entire policy premium any time you want to do it.

Q. You mean what?

A. I mean that "A" ties "B" into the policy.

Q. And what is "B"?

A. That is the assignment of the premium obligation.

Q. To whom?

A. To the United States Navy.

Q. And by whom?

A. The Travelers Insurance Company and Walter Butler Company.

Q. Tell the Court whether similar types of endorsements existed with respect to the other two policies?

A. Yes, sir; they should be on the other two policies. Here is the same endorsement as is labeled "A" under policy WSLG-863387, and we have a duplicate of exhibit "B" on that same policy, WSLG-863387, and we find similar endorsements on policy USLA-863388.

Q. And that takes care of the two policies?

A. Yes, sir.

Q. Turning now, Mr. Peterson, to the War Projects Rating Plan Endorsement which is in this exhibit, Defendants' Exhibit No. 8, on the side, and carries the number of 3016, I want to call your attention to the method provided in that [162] endorsement for computing the premium used when that endorsement is a part of the policy. Please

(Testimony of George E. Peterson.)

explain how the premium is computed under that endorsement.

A. I will take these up in sequence. First, it tells how the premium—the standard premium is computed, and defining the standard premium. It is made up by a manual of rates applicable to the classifications that are used to describe the operation of the insured, and the next item I want to define this: You have losses incurred. That means the sum of all the losses, both paid and outstanding. That is the losses which are actually incurred, and the modified losses, that means those losses described increased to take care of claim adjustment cost. Under this plan the Government has set up a factor of 1.12, so you multiply the actual losses by 1.12 to get the modified losses; allocated claims expenses are such items as have to do with such things as expert testimony in connection with occupational diseases or medical examinations, or X-rays or anything like that. Fixed charges relate to the provision of the plan that has to do with the actual expenses of the home office pay roll, inspections, and incidental expenses other than expenses which have been allowed in connection with adjustment of claims, and exclusive of expenses for commissions, providing for no profit whatever. It is the true cost. Having [163] established these factors you determine the size of the risk on the best estimate possible, and that becomes the standard premium. However, the maximum premium is ninety per cent of the standard premium. You take the fixed charge

(Testimony of George E. Peterson.)

percentage as set up in the table shown and multiplying by the fixed percentage you get the fixed charge. To that fixed charge you add the modified loss. That is arrived at by this factor of 1.12 which I described, and you may add the allocated claimed expenses, and that becomes the premium which is subject to the tax applied in the locality, and the sum of all these various things, that becomes the final premium under the plan, subject, however, always to the maximum of ninety per cent of the standard premium.

Q. The final premium, Mr. Peterson, how is that characterized?

A. The final earned premium.

Q. Is there a provision for any interim payments on account of the premium?

A. Yes, it provides for a deposit, or a temporary payment, or a premium advance.

Q. What is the first?

A. The first is fifteen per cent of the estimated standard premium. That is something you have to account for, and then it provides for periodical audits, and they also call for interim [164] payments and premiums which are predicated on the developed premium as a result of the advances. The carrier is not permitted at any time to charge the full premium, since the plan provides for fifty per cent of the earned standard premium on policies written on a pay roll basis determined by the periodical audits, and fifty per cent of the earned standard premium on all other policies determined on a

(Testimony of George E. Peterson.)

basis of what they call actual monthly exposures.

Q. The payment of fifty per cent, now what is the next calculation after you get this?

A. There is a provision also, under this rating, for the furnishing of an itemized statement of incurred losses. At a certain period the plan calls for an adjustment. Sixty days after the termination of the policy there is demanded by the plan an adjustment which is called a preliminary adjustment. In that adjustment you make the calculation of the premium as I have described here. If the premium developed by the experience is less than the premium that you have collected by this method and as shown by the audit, that is, if the premium due is less than the amount collected, there is then due to the assured—unless the Government had already taken over by assignment, a return of premiums which have been collected. In case it is indicated by the experience, conversely, [165] that is, that the premium collected is less, it may call for additional premium from the risk to bring it in conformance with the plan as I have described it. However, all of this must come within the ninety per cent maximum of the standard premium.

Q. What is that called?

A. That is the final premium computation, and, by the way, it cannot be made more than six months after the termination of the policy.

Q. In particular reference to this policy, Mr. Peterson, were the steps in the plan which you have testified to used in computing the earned premium?

(Testimony of George E. Peterson.)

A. Yes, sir.

Q. I hand you now what has been marked as Defendants' Exhibit No. 9, and I will ask you to state what it is in connection with this plan.

A. This is an audit voucher.

Q. At what stage of the proceedings?

A. It represents one of the audit periods and has reference to the pay roll for the period of April 10th, 1942, until July 30th, 1943.

Q. What is the net result, generally, of the audit?

A. It determines the standard premium, which, in turn, determines the maximum premium, and also the—also determines the fixed charge. [166]

Q. Is it used as the basis for the payment of the fifty per cent you spoke of? A. Yes, sir.

Q. Turn to the last page and show us where it appears. A. May I make an explanation?

Q. Yes.

A. I think I said from April, 1942, to July, 1943. The first page shows April, 1942—April 10, 1942, to July 25th, 1942.

Q. Now, Mr. Peterson, turn to the last page on that exhibit and show us where the fifty per cent payment on the premium appears.

A. Take this page dated December 2, 1942, for the period of August 29th, 1942, until October 31st, 1942, in this case you have a total earned premium of \$1062.96, and fifty per cent of the standard earned premium, \$531.48.

Q. That is the amount paid to the carrier?

A. That is right.

(Testimony of George E. Peterson.)

Q. Will you look at Defendants' Exhibit No. 10 and state what that is in relation to the method?

A. That is the preliminary adjustment that takes place about sixty days after the termination of the coverage.

Q. Did it develop the returned premium? [167]

A. This risk had a remarkably good experience. It returned a substantial amount.

Q. What was the amount?

A. \$440,985.33 on all coverage.

Q. On the three of these policies?

A. Yes, sir; they were combined.

Q. I call your attention now to Exhibit No. 11, what does that represent?

A. That is the net final cost. It has not been passed through the company records. It is on the form that it was a tentative calculation of the final premium on this risk.

Q. According to the calculations made, what was the additional refund due to the Government?

A. There is an additional refund at the time this was made of \$7,730.83.

Q. I hand you stipulation and show you where the earned three premiums appear——

A. (Interposing): Well, in this figure there is included——

Q. Just tell me what it is.

A. \$246,126.56, and as it applies to the State of Idaho, as I said, there was some in here to the State of Washington. The State of Idaho figured \$246,124.35.

(Testimony of George E. Peterson.)

Q. Now, Mr. Peterson, this is Defendants' Exhibit No. 11, or the final computation. It shows \$246,126.56, whereas this [168] indicates also \$246,126.56. That is exactly the same? A. Yes.

Q. You have referred to Defendants' Exhibit No. 9, which reads, "Corrected"? A. Yes, sir.

Q. I call your attention to Exhibit No. 4—Plaintiffs' Exhibit No. 4, which reads, "Superseding," is that the audit on which fifty per cent of the standard premium was also calculated? A. Yes, sir.

Q. Was that submitted in connection with the determination of the premium?

A. Yes, sir; there are audits made for various periods. I am speaking now of the compensation policy from April 10th to July 25th, and the policy numbered WSLA-863388, and WSLG-863387. The next period takes from July 25th to August 29th, and you go through the three policies again, and then you pick up the period of August 29th to October 31st, and go through the three policies again.

Q. What is the reason for having a superseding audit?

A. Well, what happened here, he was there to make an audit up to January 2nd, according to the files I have read, and the advice we had, for the reasons there were a number of errors in the pay roll, and possibly some errors in the rates. [169] There was an opportunity to make a clean sweep, a sort of review of it to cover the period from November 26th to January 2nd, and then this be-

(Testimony of George E. Peterson.)

comes the final record of the earned premium during that period.

Q. You mean exhibit No. 4? A. Yes, sir.

Q. Now, Mr. Peterson, does the plan in this case, as applied to these three policies make a provision for an adviser, an insurance adviser, by the assured?

A. Yes, sir; it does.

Q. The plan would show that? A. Yes, sir.

Mr. Horowitz: Defendants' Exhibit No. 18 contains several documents. It has what is marked Defendants' Exhibit "C" of Defendants' Exhibit 18, which was identified by the witness as the Navy plan which was involved. When the Navy made this certificate they include two other documents; and I want to offer them and tell the Court what they are. This is under the seal of the Navy. The first page of this exhibit is a letter dated May 18th, 1942—which was the date of the policy—in which the Navy approved the awarding of this insurance on the Comprehensive Rating Plan to the Travelers Company. The second is a copy of the contract referred to as Contract NOY-5493 for the construction of the Naval Training Station [170] for thirty thousand men at Farragut, Pend Oreille, Idaho. Exhibit marked Exhibit "C" of Defendants' Exhibit 18 is the plan itself, and I offer these, and each and every part of them in evidence as Exhibit 18.

Mr. Whitla: I object to the letter written as not being material and not binding on us in this case. It is wholly incompetent for any purpose whatever. This is the first time I have seen this exhibit, and

(Testimony of George E. Peterson.)

I think I should have a little time to look it over. As to the Comprehensive Rating Plan, we object to its introduction for the reason that this plan by its terms specifically provides several methods of handling insurance. I have one copy that they furnished to me, and it is a little different. As I say, I would like a little time to look this contract over. It is the first time I have seen this at all.

Mr. Horowitz: It is the same thing that you have been furnished, the same thing exactly.

Mr. Whitla: I object to it as it provides for several different plans of handling insurance.

The Court: I think I can shorten this. You gentlemen will just argue between yourselves. I will admit it, if that is the only objection, reserving the ruling, and my decision as to its materiality and legality.

(Further remarks of counsel not transcribed.)

(Whereupon, Defendants' Exhibit No. 18 for identification was admitted in evidence.)

Q. (Mr. Horowitz, continuing): Mr. Peterson, referring now to this exhibit No. 18, will you please turn to the portion which makes provision for the employment of an insurance adviser and fixing his duties?

A. Here it is. (Indicating.)

Q. You are referring now to Defendants' Exhibit marked "F" of this Exhibit 18?

A. Yes, sir.

Q. Now, will you refer to the plan itself and point out wherein the insurance adviser is pro-

(Testimony of George E. Peterson.)

hibited from receiving any compensation from any insurance carrier?

Mr. Whitla: We admit that it is in there.

Mr. Horowitz: Will you admit that it is at the end of paragraph number ten?

Mr. Whitla: Yes; I have it marked right here.

Q. (Mr. Horowitz, continuing): Now, with reference to the bond filed with the Industrial Accident Board, was any commission paid in connection with that? A. No, sir.

Q. Was any premium charged the assured?

A. No, sir.

Q. Turning now, Mr. Peterson, to the Bozanta Tavern [172] policies shown in Exhibit No. 8—Defendants' Exhibit 8, can you by referring to that exhibit call the Court's attention to wherein the Bozanta Tavern policies appear? A. Yes, sir.

Q. What is the number of the first?

A. That is number UB-908556.

Q. And the number of the second one?

A. That is number HPS-908557.

Q. When these policies were issued——

Mr. Horowitz: Strike that, Mr. Reporter.

Q. When the insurance coverage with respect to the Bozanta Tavern was first issued, was it under Comprehensive Rating? A. Yes, sir.

Q. And then was it cancelled under that plan?

A. Yes, sir.

Q. And then were these two policies taken out?

A. Yes, sir.

Q. Who produced the business?

(Testimony of George E. Peterson.)

A. The request for the termination of one and the issuance of the other was from, or came through, the Acme Brokerage Corporation.

Q. To whom? A. To our office. [173]

Q. And were the policies written as a result of that? A. Yes.

Q. Where? A. At Hartford, Connecticut.

Q. And it was placed by whom?

A. The Acme Brokerage Corporation.

Q. With whom? A. With Mr. Butler.

Q. I asked with whom it was placed?

A. With the Travelers.

Q. Where was the writing itself done and the premium charged?

A. At Hartford, Connecticut.

Q. Was a commission paid with reference to these two policies? A. Yes, sir.

Q. What was the amount of the commission?

A. \$12.48.

Q. The policies were issued where?

A. I would like to look at those policies again.

Q. (By Mr. Whitla): Do you have to look at a memorandum to refresh your recollection?

A. I would like to look at them. I have a copy of the policies. [174]

Q. (By Mr. Horowitz): Can you tell where it was written?

A. It was either at Hartford or New York.

Q. It was either at Hartford or New York?

A. Yes, sir.

Q. What was the premium on that, again?

(Testimony of George E. Peterson.)

A. The policies didn't last long—they only ran from January 1st to April some time.

Q. Was there a return of the premium in this as a result of the cancellation? A. Yes.

Q. And was there ever a return of the commission? A. No; no return.

Q. You mean to the risk?

A. Yes, sir; the unearned commission would be returned, that is by the agent to the assured.

Q. The actual commission was twelve dollars?

A. Yes, it seems to be \$12.48. I have a breakdown on that somewhere.

Q. Can you locate it, whatever data you have, and see if you can refresh your recollection whether there was a return of the commission after the initial commission was paid? A. To whom?

Q. Well, it was to the Acme Brokerage Company. [175]

A. None.

Q. In any case, the net commission received by the Acme Brokerage was the amount you testified to? A. Yes, sir; \$12.48.

The Court: How was this brokerage company paid for doing this work?

A. They were paid by Walter Butler Company—I am not speaking about these two, but the War Projects Rating Plan provided what they were to have under the War Rating Plan.

Q. (Mr. Horowitz, continuing): Do you know what that was?

(Testimony of George E. Peterson.)

A. No, but I could figure it though, but we seldom see it.

Q. Would you know? A. No, sir.

Q. It was between the contractor and the insurance adviser? A. Yes, sir.

Q. And would be subject to the rules of the Navy?

A. This plan sets up a table of fees that are permissible. The contract and contractor have to conform with that, otherwise he is not reimbursed.

The Court: Whatever fee was paid was taken into [176] consideration by you in fixing the premium? A. No, sir.

The Court: And has nothing to do with fixing the premium?

A. No, sir; the plan was set up in such a way that it was entirely exclusive of any commissions. I think the contractor had to reach an understanding by an agreement, a written agreement, with the adviser of his choice, subject, of course, to the Navy approving it. He was permitted to pay a certain fee.

Q. (Mr. Horowitz, continuing): Is there any relation between the amount paid the adviser and the premium paid for that insurance by the contractor?

A. Yes; there is a table of values that they follow.

Q. My question is, Does this amount of premium charged the assured in any wise depend on the amount paid by the contractor to the insurance adviser?

(Testimony of George E. Peterson.)

A. No, but the fee of the adviser is predicated on the size of the risk.

Q. So far as the carrier is concerned they don't know what is?

A. I don't know what fee was paid on this job. I didn't have anything to do with it.

Q. This fee that is paid to the contractor by the adviser, [177] is that reimbursable under the contract?

A. I understand that the plan provides for it.

Q. Are you familiar with the practice of the defendant companies when an arrangement is made in the field for the payment of a resident agent,—the payment of a resident agent for his countersignature whereby one department notifies another department in the company?

A. Yes, sir; I am. I have occasion to refer to it.

Q. With respect to the period in 1936, were you with the company at that time? A. Yes, sir.

Q. How long had you been with the company at that time? A. About twenty-six years.

Q. At the time in question, which was September or October, 1936, what was the practice of the company?

A. With respect to notifying the department issuing checks as to the arrangement made in the field?

Q. Yes.

A. It is the function of the agency's staff, they inform the agency assistant secretary. He does not issue the checks; he has no control over the money,

(Testimony of George E. Peterson.)

except by directing the company auditor as to the contract which has been entered into by the field man, and he authorizes the auditor, telling him sufficiently about it to justify him [178] in issuing checks for the account, and it is a continuous performance.

Q. You have a memorandum issued by the appropriate officer, that is, the home office official to the auditor? A. Yes, sir; I do.

Q. I hand you what has been marked as Defendants' Exhibit No. 22 for identification, and I will ask you if that is the memorandum you testified to?

(Whereupon document referred to was marked Defendants' Exhibit 22 for purposes of identification.)

A. Yes, sir; it is.

Q. (Mr. Horowitz, continuing): Was that in the regular course of business, the making of a memorandum of that kind? A. Yes, sir.

Q. Was that done in accordance with business practice of the company? A. Yes, sir.

Mr. Horowitz: I offer Exhibit No. 22 in evidence at this time.

Mr. Whitla: We object to it as incompetent, irrelevant and immaterial. It apparently is made at the home office back in Hartford, and is apparently made on information that he received from the field representative in this section of the country. It is improper; it is hearsay; they have, [179] it is

(Testimony of George E. Peterson.)

wholly immaterial for any purpose, and would be hearsay of the worst kind.

Mr. Horowitz: We are permitted to offer explanatory evidence. I am relying on the statute for that.

The Court: It seems to me that they are recognizing the Idaho law in part as to the policies having to be countersigned by an Idaho agent, or agents. I think possibly this should be admitted, because, as I say, they have recognized the Idaho law in part, at any rate. This statute does not provide any penalty for a violation of the statute. Possibly there are no remedies for doing that. Here the testimony seems to show that the companies, before they started to do business, felt that they must have an agent to countersign these policies, and still there seems to be a scheme here to evade the law. I believe I had better admit this in evidence.

(Whereupon Defendants' Exhibit 22, for identification was admitted in evidence.)

Mr. Horowitz: The exhibit admitted in evidence was a document dated October 15th, 1936, addressed to Auditor Flynn to the effect that Eugene H. Ware Company was appointed agents at Coeur d'Alene, Idaho, and that an arrangement was made to countersign the Idaho business produced by non-resident agents and brokers, and an agreement was made to pay five dollars per month for the service. The document is written [180] and the name typed in "C. E. Ferree, Assistant Agency Secretary."

(Testimony of George E. Peterson.)

Q. (Mr. Horowitz, continuing): Subsequently to this letter of October 21st, 1936, which is in evidence, were risks submitted to Mr. Ware for countersignature? A. They were.

Q. That is on out-of-state business?

A. Yes, sir.

Mr. Horowitz: I have another exhibit here, No. 23. It, too, happens to have various documents in it. The first document I wish to offer in that is a letter dated June 29, 1942, in which the Navy approves the Travelers Insurance Company on the War Projects Rating Plan and states that the premium thereunder is reimbursable under contract NOY-5493. In addition to that there are some matters showing the Navy's regulations. They are subsequent to the dates involved here. I would like to offer this one letter.

(Whereupon, documents referred to were marked Defendants' Exhibit 23 for purposes of identification.)

Mr. Horowitz: I offer in evidence now exhibit marked 23-A.

Mr. Whitla: We object to it is incompetent, irrelevant and immaterial for any purpose whatever in connection with this case. [181]

The Court: I am inclined to agree with you, but I will admit it subject to the objection.

(Whereupon Defendants' Exhibit 23-A for identification was admitted in evidence.)

(Testimony of George E. Peterson.)

Q. (Mr. Horowitz, continuing): Mr. Peterson, if the commission is payable to the counter-signing agent, or was payable to the countersigning agent, in 1942 and 1943, would it have been possible for the insurance company to write this insurance under the War Projects Rating Plan?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial. It is not a question of evidence, but a legal question.

The Court: He may answer.

Q. Would that have been possible?

A. No; it would not have been.

Q. Assuming that the various insurance companies, such as the Travelers on out-of-state business was required to pay a commission to the producing agent and the same amount to the counter-signing agent in Idaho, would it be possible for such various insurance companies to compete with companies in Idaho not required to pay such a commission?

Mr. Whitla: We object to that. There was no commission paid to anyone outside the state.

The Court: The Court has some testimony before [182] it that the matter was handled by a brokerage company. Certainly, they didn't handle it for nothing. Someone paid for it, no doubt. The amount must have been paid, even if it was paid by the Butler Construction Company.

(Further remarks by counsel and Court not transcribed.)

(Testimony of George E. Peterson.)

Q. (Mr. Horowitz, continuing): Mr. Peterson, in the insurance business world are there people who are engaged in the business of being insurance analysts who are employed by concerns regarding their insurance policies?

A. Very definitely, there is, and it is becoming increasingly popular.

Q. In connection with the compensation, who pays that compensation for the analyst?

Mr. Whitla: I object to this as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I have never known where the insurance company would hire outside people to make such an analysis. It is quite the contrary. Concerns that become interested in their costs for some reason or other, they want to know what their insurance costs are, and that is true even with self-assured concerns, or with carriers. I know of one company,—

Q. (Mr. Horowitz, interposing): Who pays them for that [183] service?

A. The assured. In this instance I have in mind it was a self-insured concern, and the fee was only a nominal one, too.

Q. In the insurance business world is there a type of organization that writes insurance on a non-commission basis? A. Yes, sir; definitely so.

Q. What type is that?

A. The mutual type.

Q. They write insurance without the payment of commissions?

(Testimony of George E. Peterson.)

A. Yes, sir. That is the principle of mutual insurance.

Q. Is that principle different between stock and mutual companies?

A. In that respect, yes. There are others.

Q. When you testified as to the War Projects Rates was the elimination of the commission the thing that made it possible to take advantage of the stock and mutual companies' facilities.

A. That was the major thing.

The Court: We will recess at this time until tomorrow morning at ten o'clock.

May 1st, 1947, 10:00 A.M.

Q. (Mr. Horowitz, continuing): Now, Mr. Peterson, [184] yesterday you dealt with the subject of mutual and stock companies. On the question of commission, what type of mutual company did you have in mind?

A. I had in mind the type of mutuals that are qualified to write this business. They must be of a certain size, and be substantial writers of workmen's compensation insurance.

Q. Can you give the Court some instances?

A. Yes, there is the Liberty Mutual; the Hardware Mutual; the American Mutual; the Employers Mutual of Warsaw.

Q. Are companies such as you mentioned writers of substantial amounts of business?

A. Yes; they are.

(Testimony of George E. Peterson.)

Q. What,—how are the persons who produce that business compensated?

A. Their business come through salaries employees, or from the risk itself.

Q. For the purpose of determination of premiums to be charged in the rate structure in the casualty companies, that is, all the stock companies and others; is account taken of the cost of the acquisition of business, that is, such costs as commissions of the agents? A. Yes, sir.

Q. Now, Mr. Peterson, in regard to the War Projects Rating Plan, after it went into effect were you permitted to [185] take into account the acquisition costs in making the rates?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial, and that is prohibited by the laws of the State of Idaho.

The Court: He may answer, subject to the objection. A. No.

Q. (Mr. Horowitz, continuing): In other words, the rate structure was fixed, excluding the cost of acquisition such as the producing agent's commission, or the countersigning agent?

A. That is right.

Q. With reference to the insurance adviser, were you permitted to take into account in fixing the rates any costs that the contractor would incur in payment for the insurance adviser's services?

A. No. As a matter of fact that was placed outside of the insurance arrangement entirely. It was something between the contractor and the adviser themselves, and that was by their own arrangement.

(Testimony of George E. Peterson.)

Q. Was the insurance adviser under the plan in any way employed by the insurance carrier?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial. The contract shows who the [186] agent was.

The Court: He may answer subject to the objection.

Q. (Mr. Horowitz, continuing): Was the insurance adviser employed by the carrier?

A. No, sir.

Q. Did the carrier have any control over the adviser? A. No, sir.

Q. Was there any certain duty in reference to the adviser,—that is, did the insurance adviser have any duty in the nature of supervision of the way the rates were fixed?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial and leading.

Mr. Horowitz: May I withdraw the question?

The Court: Yes.

Q. (Mr. Horowitz, continuing): Mr. Peterson, you have testified to certain procedure followed in determining the amount of earned premium. There is in evidence in that connection Plaintiff's Exhibit No. 4, purporting to be a superseding audit, and Defendants' Exhibit No. 9, which is headed "Corrected Audit," to which you have testified, Mr. Peterson, and Defendants' Exhibit No. 10, "Preliminary Settlement Statement". Now, will you please tell the Court whether the computations, the documents, evidencing the computations were sub-

(Testimony of George E. Peterson.)

mitted [187] for clearance to the insurance adviser in this case? A. Yes, sir.

Q. Could you get any money without getting a clearance by the insurance adviser?

A. The plan contemplated that he would review these records, passing then on the questions that he might have in mind. He might have occasion to question some procedure. There was correspondence between the adviser and the company in regard to things that he felt were discrepancies as we reported them.

Q. Please tell the Court whether the correspondence contained in the Cashier's files contain some between the defendant companies and the insurance adviser relative to the computations?

A. I think there is some in here,—yes; here is one (indicating).

Q. That is Defendants' Exhibit No. 17?

A. Yes, sir. And here is more correspondence calling attention to the fact that the adjustment is due, and they want to know,—

Q. (Interposing): Just tell us, Mr. Peterson, whether it contains correspondence between the Travelers Company relative to these three insurance policies and the insurance adviser?

A. Yes, sir; it does [188]

Q. Now, Mr. Peterson, can you take the plan,—the War Projects Rating Plan, which is in evidence as Defendants' Exhibit No. 18, and turn to the form, or the insurance adviser's agreement which is on the last page, and tell us what amount the insurance

(Testimony of George E. Peterson.)

adviser's fee would have been if it had been paid by the Walter Butler Construction Company according to the exhibit?

A. I made a calculation—yes, I made such a calculation in anticipation of this request. I have it in my bag. It follows the calculation of the plan and the regulations exactly. The total standard premium,—

Q. (Interposing): Just give me the total figure, Mr. Peterson.

A. A fee of \$10,586.61.

Q. Do you know, as a matter of fact, whether that was paid by the Walter Butler Company?

Mr. Whitla: That is objected to as entirely immaterial.

The Court: I think perhaps it is, but he may answer. A. I don't know.

Q. Did you in fixing the rate for the insurance premium charged the Walter Butler Company add anything in that rate for this sum of \$10,586.61, or any other sum to be paid to [189] the insurance adviser?

Mr. Whitla: Now, we object to this. It is wholly immaterial.

The Court: I think your objection is well taken. However, I will permit him to answer, subject to your objection. A. No.

Q. (Mr. Horowitz, continuing): Did you either pay, or have a contract to pay, any insurance adviser in this case anything for services?

Mr. Whitla: We make the same objection.

(Testimony of George E. Peterson.)

The Court: He may answer. A. No.

Q. Was the Acme Brokerage Company, the adviser on these three policies, insurance adviser on any more War Rating Plan insurance written by the Travelers Company? A. No.

Q. Did the Travelers fix any rate of commission to any one on these three policies under the War Projects Rating Plan?

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. No.

Q. Mr. Peterson, if this business has been placed in [190] Idaho, this business covered by the three policies here, under the War Projects Rating Plan would any commission have been payable to any producing agent under that plan? A. No.

Mr. Whitla: We object to that. He has gone into this before. It is repetition.

The Court: The answer is in the record. It may stand.

Q. If the business embraced by these three policies had been placed in Idaho would the insured have been required to have an insurance adviser under the plan? A. Yes, sir.

Mr. Whitla: That is objected to as a conclusion of the witness.

The Court: Yes, it is in the contract,—I believe that is in the contract. The answer may stand.

Q. Do you know, Mr. Peterson, what the practice of the Travelers Companies is with respect to countersigning risks, irrespective of the local law?

(Testimony of George E. Peterson.)

A. Yes, sir.

Q. What is that practice?

Mr. Whitla: Objected to as immaterial.

The Court: He may answer.

A. The practice of the Travelers is, and has been, to clear the policies covering specific risks in all [191] outside states in that particular state for countersigning, that is, to send them out to be countersigned.

Q. Does that depend on the provisions of the local law? A. That is the general practice.

Mr. Horowitz: I believe that is all the direct examination.

The Court: I have a question I would like to ask this witness at this time: Your stipulated premiums are recited at \$246,126.56 in connection with these policies; the stipulation then says that it is subject to final adjustment. I would like to know if that adjustment is to be made.

Q. (Mr. Horowitz, continuing): Will you explain what final adjustment is contemplated, Mr. Peterson?

A. It is called for in the plan.

Q. Do you want Defendants' Exhibit No. 11 to look at? A. Yes.

Q. And here is the stipulation also, Mr. Peterson.

The Court: Is the adjustment up or down?

A. This adjustment of \$246,126.56 is the final adjustment as called for by the plan, but it has not yet cleared the companys' records, nor has it been

(Testimony of George E. Peterson.)

cleared by the Navy Department as such, and consequently when this is negotiated as a final settlement, not earlier than six months after the preliminary settlement, and on account of this case final settlement has been deferred, but on the present indication is should settle at about \$246,000.00, and if these are used it will be about that figure.

The Court: What have you received in premiums?

A. \$253,857.39, thus indicating a premium return of \$7,730.83 in this tentative settlement.

The Court: That is all I care to ask.

Mr. Horowitz: That is all.

Cross-Examination

By Mr. Whitla:

Q. Taking this statement that you have introduced in evidence that carries on the face of it purported final release dated the 23rd of October, 1945, why was that not completed at that time?

A. I think I have answered that question.

Q. But I am asking it again.

A. This case was pending in this Court in Idaho, and we asked that this matter be deferred until the matter was cleared out here.

Q. In other words, the fact that the claim for premium was pending had something to do with it,—I mean the claim for commission?

A. It wasn't settled, and as a matter of fact we did not know, not having had a case like this before, just where [193] we would stand. There is no pro-

(Testimony of George E. Peterson.)

vision to take care of any penalty that might be imposed by the Court of Idaho, and we asked what the matter be left open to be discussed, that is, so that we might discuss this question at a subsequent date, depending on the action of the Court.

Q. Now, going back to the proposition that you testified that this Cashier's file contained correspondence between the company and the insurance adviser? A. Some of it is there.

Q. Do you have other correspondence with the adviser? I thought you furnished us a complete statement of the matters regarding these policies?

A. Yes, sir.

Q. Then the correspondence is all contained in this file? A. I think it is; yes.

Q. Now, will you take this file and letter all of these matters with the adviser,—letter them “A”, “B”, “C”, and on down so that we can see what the correspondence with the adviser was. Have them properly lettered so that we can identify them.

A. May I ask a question?

The Court: Yes.

A. Do you want the letters from and to the advisers?

Q. (Mr. Witla, continuing): Yes; all of the correspondence. [194] Now, they are lettered “A” to what? A. “A” to “O”.

Q. This begins at the back of the file and is built up toward the front? A. Yes, sir.

Q. But the letter “O” is at the back?

A. Yes.

(Testimony of George E. Peterson.)

Q. So that the first letter was one by the Assistant Cashier of the Travelers Company addressed to the Acme Brokerage Company dated October 15th, 1942?

A. That is right.

Q. And it was regarding some classification that they had reported which was in error, and you sent it to him calling attention to that?

A. Yes, sir.

Q. And it amounted to a total of \$14.47 that you had overpaid?

A. The result of an audit and involves a credit of \$14.47.

Q. You sent that to the Acme Brokerage Corporation to show that there was an overcharge to the Walter Butler Company of that amount?

A. Yes.

Q. Now then the next is marked with a letter "N" and is dated October 26th, 1942, sent by Walter Butler Company [195] to the Acme Brokerage Corporation to where you charged \$222,884.68, and the correct amount was \$222,484.68?

A. I might mention here, —

Q. (Interposing): You can answer this question that that is what it is about?

A. Yes; it is.

Q. That was from you to the Acme Brokerage Corporation?

A. No; that was a letter from a Mr. Norton to the Acme Brokerage Corporation calling attention to the mistake.

Q. It was from the Walter Butler Company?

(Testimony of George E. Peterson.)

A. Well, Norton was on the payroll of the Acme Brokerage Company. He was their representative on this project as adviser.

Q. He was in St Paul, was he not?

A. Yes; he was their adviser assisting them in connection with this work.

Q. They found an error of \$400.00?

A. When it was carried forward,—that is right.

Q. You say that he was on the payroll of the Acme Brokerage Company? Now, actually he was an employee of the Walter Butler Company?

A. He was on the payroll of the Acme Brokerage Company,—probably both.

Q. He was with them a long time? He remained with them [196] afterwards? A. I think not.

Q. Now, Mr. Peterson, this letter which is marked “M” addressed to the Acme Brokerage Company, signed by a Mr. Mallory, Assistant Cashier of your Company, and it is relative to a typographical error in regard to a roofing bill, or a premium on roofing? A. That is right.

Q. And that was dated October 30th, 1942?

A. Yes, sir.

Q. And the next one was under date of December 4th, 1942, and is marked with the letter “M” and was from Mr. Mallory to the Acme Brokerage Company of New York, sending them certain audit reports and asking them to forward them through immediately so they could arrange for the payment? A. That is right.

Q. That is marked with the letter “L”?

(Testimony of George E. Peterson.)

A. Yes, sir.

Q. The next is a letter from your Assistant Cashier to the Acme Brokerage Company under the date of January 4th, 1943,— that is marked with the letter “K”, including a bill for these policies and asking their cooperation in getting payment of that? A. Yes, sir. [197]

Q. The next is marked with the letter “J”, and is a letter dated March 6th of 1943, signed by A. W. Terhune, Branch Accountant, and it is addressed to the Acme Brokerage Company, indicating that some \$75,000.00 was due, and asking for some action on it?

A. I call your attention to the fact that some reference is made there to a revised figure, and asking that it be disposed of.

Q. In a few days, in fact 4-5-43 you got a remittance for the exact amount? A. Yes, sir.

Q. And that was on the charge account in which you billed them for some \$624,000.00 and they had remitted five hundred and some odd thousand, and all of this is shown by the Plaintiff's Exhibit “L”?

A. But the point was that there was something *that* our auditor to clear up. That was referred to in that paragraph. That is one of the times that it was mentioned.

Q. But your bill of March 6th showed that you had billed them for \$624,330.70, and you had been paid \$548,657.75, leaving a balance due of \$75,672.95, and by this letter, which has been marked “J” you wrote them in regard to that balance and asking for payment?

(Testimony of George E. Peterson.)

A. And referring to the explanation that was given by the [198] auditor of some question that had arisen, the details of which was not in this file.

Q. You got a remittance promptly?

A. Yes, sir.

Q. Now, the next letter is marked with the letter "I", in which you enclose some statement amounting to \$22,316.80, and asked for prompt remittance?

A. Yes, sir.

Q. That is dated when?

A. April 10th, 1943.

Q. And on that you got prompt remittance of that amount, didn't you, as shown by Plaintiff's Exhibit "O" dated 5-3-43,—wasn't remittance sent to you in accordance with your letter of April 10th calling your attention to the exact item?

A. Yes, sir.

Q. That is correct, is it not?

A. Yes, sir; that is on May the third.

Q. You wrote on April 10th, and remittance came through on May 3rd? A. Yes, sir.

Q. And then on April 16th you wrote them sending certified copies of some bills that were sent in?

A. There were some telephone calls referred to in this letter. [199]

Q. Yes; they wanted some certified copies of these bills to make some reports?

A. I suppose that is so. That is what we sent them.

Q. That is all that letter refers to?

A. It refers to the telephone calls.

(Testimony of George E. Peterson.)

Q. The next letter, marked with the letter "G" was by you to the Acme Brokerage Company sending the cancellation of this policy WUB-863386,—it was the compensation policy—and policy WSLG-863387, as well as the other policy WSLA-863388.

A. Yes.

Q. You also sent that same notice to the Navy?

A. And to Walter Butler.

Mr. Horowitz: What is the date of that letter?

Mr. Whitla: June the 29th.

Q. (Mr. Whitla, continuing): You sent that same letter to the Navy and Butler and all of them?

A. I assume so.

Q. Now, the next letter was dated August 3rd, that is marked with the letter "F," and that was to the Acme Brokerage Company by Mr. H. P. Hunninghous, Assistant Cashier, in which you sent copies of certified statements and audits for various periods showing irregularities on the premiums, and showing a balance of \$675.45, and asking for payment? [200]

A. That is right.

Q. Then on August 18th, 1943, you again wrote them regarding these same bills, and told them there would be some refund as soon as they remitted the \$675.46?

A. Yes.

Q. On August 23rd you again wrote them, or, rather, they wrote you advising you that they sent the checks and stating they would appreciate the refund so that they could transmit it to the assured?

A. Yes, sir.

Q. And you wrote them advising that as soon as

(Testimony of George E. Peterson.)

the check was made out you would then send the check, or, rather, as soon as the statement was made, you would send the check? A. Yes.

Q. And that is marked with the letter "C", and dated August 25th? A. Yes, sir.

Q. And the letter marked "B", you wrote under date of August 30th, 1943,— that is also marked Defendants' Exhibit 17, in which you sent them your check for \$440,985.33, together with five sets of figures showing how you had computed that amount? A. Yes, sir.

Q. And that is the refund check that is shown in the [201] stipulation for which you ask credit in this case? A. I guess so.

Q. You have no other check of that amount?

A. I am not verifying the exact amount.

Q. On August 31st you sent the data to the Acme Brokerage Corporation supporting that preliminary adjustment? A. Yes, sir.

Q. And that constitutes the entire correspondence between your company and the Acme Brokerage? A. From the Cashier's file.

Q. Do you have any other file?

A. I don't know, but there was probably information given verbally.

Q. Do you have any other file?

A. No other file.

Q. All of these computations, and all of these matters, except the ones from Norton, were made by your company to the Acme Brokerage?

A. Yes, sir; they were.

(Testimony of George E. Peterson.)

Q. During all of that time you just had one letter from the Acme Brokerage to yourselves?

A. As far as I know.

Q. Now, Mr. Peterson, as to these mutual companies to which you referred, first take the Liberty Mutual, where [202] does that company operate?

A. That is country-wide.

Q. In this section?

A. I cannot answer that specifically, but it is a matter of publication, such as given by the Spectator, and also Best.

Q. The biggest mutual company is the Lumberman's Mutual of Chicago?

A. That is probably true; yes.

Q. They do about fifty,—about five hundred fifty million in premiums?

A. It is a matter of record.

Q. They have agents all over the country, and they pay them a commission?

A. They operate some on a commission basis.

Q. Best is a standard work? A. Yes, sir.

Q. It shows the various mutuals and what they pay for commissions, and all about it, and shows all the costs taken from their officials reports?

A. Yes, sir.

Q. Do you know of any mutual company handling this class of business operating in this section of the country that does not pay a commission to their agents? [203]

A. I would have to see where they operate specifically. Some of those I mentioned are on a

(Testimony of George E. Peterson.)

country-wide basis, but to what extent they operate in Idaho I am not in a position to say without referring to the record.

Q. Now, this other mutual company that you mentioned,—I believe the Hardware Mutual. It is an organization that was started by the Hardware Dealers organization, or the hardware organization to handle their own insurance?

A. Well, they have expanded greatly. There were many others started in the same manner. There is the Bakers Mutual, and the Butchers Mutual, but the name doesn't mean anything any more. They do a large business outside of the organization as it originally was.

Q. The American Mutual, where does that operate? A. That is country-wide.

Q. Where does it operate?

A. Its office is at Boston.

Q. Is there a mutual in New York that is a subsidiary of the Lumbermen's Mutual?

A. I don't know about that.

Q. And the Employers Mutual of Warsaw, where is that from?

A. That is Warsaw, Wisconsin.

Q. Do you know where they operate? [204]

A. I know they had war contracts in the middle west.

Q. Do they keep agents?

A. They do not operate on an agency system as such. If you will refer to the record,—

Q. (Interposing): You went through Best?

(Testimony of George E. Peterson.)

A. I went through the Spectator chart.

Q. Now, here is the American Mutual Liability, they wrote thirty-four million in premiums in 1945, and the total amount paid in commissions was \$274,900, approximately?

A. Yes, sir; that amounted to eight-tenths of one per cent. Now, you take the Factory Mutual Liability Insurance Company of Providence, while it is a smaller company, or write a smaller volume of business, they wrote \$2,423,000 in premiums, and they didn't pay any commissions.

Q. They have salaried agents?

A. I presume so. They have two million worth of business.

Q. Mr. Peterson, every company to develop business has to pay some money to get it developed? It just doesn't come to them out of thin air?

A. That is probably so. Now, here is the Hardware Mutual. They wrote \$16,274,000, in premiums, according to the Spectator, and they paid \$1,870.00, which is very small.

Q. Is the Hardware Mutual the company that writes hardware stores for only members of the Association?

A. They were originally founded as an association. I am [205] under the impression that they branched out considerably.

Q. Are you sure of that?

A. I am under that impression.

Q. Now, the next one is no doubt a great factor, since they rate next to the Travelers, and that is the Liability Mutual of Boston?

(Testimony of George E. Peterson.)

A. They wrote \$75,883,000 in premiums and paid no commissions. There is no record of any commissions. I know from personal contact that they do not pay commissions under any circumstances.

Q. They have salaried agents in the states in which they operate?

A. No; that is the way they operate; now, with respect to particular companies, you can go to the Texas Employers Mutual, who are a local company, and they write some \$7,126,000. That company had commissions of \$9,423.45, or one-tenth of one percent.

Q. That is a concern in Texas that writes for the Employers Association?

A. I think they write outside of the State of Texas.

Q. It is like the Pennsylvania Manufacturers Association?

A. I would not say so. They operate exclusively in the state, but I am sure that the Texas Company is not in that position, or do not write on that basis. [206]

Q. They write for their members only?

A. I don't know. I know you have the Merchants Mutual Casualty that wrote some six million in premiums, but I think the important thing here is the size of the mutual company, and the volume of compensation business they do. That would be the only ones that would handle projects of the magnitude of the Walter Butler Company construction

(Testimony of George E. Peterson.)

out here. While this was not the largest handled during the war, it was good-sized, and they were the ones that I had reference to.

Q. Now, Mr. Peterson, any of these mutuals that are engaged in the general business, that is, practically all of them do have regular agents, and some of them pay the biggest commissions of any companies?

A. You will find that they are the people who are not writing compensation, but devote themselves largely to the automobile field.

Q. How about the Lumbermen's Mutual? Doesn't it write all lines?

A. The Lumbermen's Mutual is the only exception.

Q. Is there several others?

A. Not of that size.

Q. I have them for you in Best, and I will get them for you at noon. Now then, handing you Defendants' Exhibit No. 7, do you have any other contract of any kind with Mr. [207] Ware relative to the countersigning at the rate of five dollars a month, other than the letter you wrote which is Defendants' Exhibit No. 7?

Mr. Horowitz: You mean in any written instrument?

Mr. Whitla: Yes, regarding that five dollars per month.

A. I have to go by that letter. I am not the person who wrote this. I have to rely upon this letter.

Q. (Mr. Whitla, continuing): It is a matter

(Testimony of George E. Peterson.)

of the files,— the information in the files of the Travelers Insurance Company. Do you have any other contract in writing with Mr. Ware regarding the countersigning for the payment of five dollars per month, other than this contained in this letter, which is marked as Defendant's Exhibit No. 7?

A. I cannot answer that question.

Q. Do you know of anything else?

A. This letter refers to a recommendation to the Home Office that the agency be recognized in this manner. It says, "Following Mr. Gilbert's explanation of our proposed arrangement to reimburse an Idaho agency for handling a small amount of countersigning that will be necessary from time to time, I recommended to our Home Office that your agency be recognized in this manner. I am now in receipt of advice that your agency has been approved for this service [208] as of October 1st, 1936, on the basis of a monthly remuneration of five dollars. Payment for the month of October will be forwarded to you as of November 1st,—" I assume from this,——

Mr. Horowitz: I think, your Honor, the letter is the best evidence.

Q. (Mr. Whitla, continuing): You testified that you had a contract by reason of an office memoranda that you introduced?

Mr. Horowitz: I offered that in evidence.

The Court: I think this witness is able to take care of himself, and I think this cross-examination is proper.

(Testimony of George E. Peterson.)

Q. (Mr. Whitla, continuing): This Defendants' Exhibit No. 22 that you introduced in evidence, which is dated October 15th, 1936, do you know anything about any contract upon which that is based, other than the letter Defendants' Exhibit No. 7? A. I cannot answer that question.

Q. You can answer whether you know anything about it?

A. I don't know about it. My testimony in regard to this, and my knowledge of the procedure, this was a Home Office matter. That is the fact that I dealt with, and I am competent to do that.

Q. This refers to some other matter in the Home Office. Now, you would be competent to handle that, provided they received word from the Home Office? [209]

A. That underlies this here (indicating), and I am not in a position to answer.

Q. Defendants' Exhibit No. 7, so far as you know, is the only proposition you have regarding the five dollars for countersigning?

A. So far as I know, of my personal knowledge.

Q. And of course for the purpose of this case you have endeavored to find out all the information regarding this which you could?

A. Not necessarily.

Q. You mean to say you came here without trying to find out about these matters?

A. I had certain functions to perform, and that is the matter that I am here on.

Q. And one of those matters was to try and

(Testimony of George E. Peterson.)

prove this contract with Ware for five dollars a month? A. I had nothing to do with that.

Q. You brought everything you could find in regard to that?

A. I was asked to just vouch for the authenticity, or to the authenticity of the procedure.

The Court: Is there a written designation of Mr. Ware?

Mr. Whitla: Yes; it is pleaded, and I think it is [210] attached to the complaint as an exhibit, and admitted by the answer.

The Court: I believe we will recess at this time for ten minutes.

May 1st, 1947, 11:10 A.M.

Q. (Mr. Whitla, continuing): Mr. Peterson, the two defendants, the Travelers Insurance Company, and the Travelers Indemnity Company, are joint companies? They are associated and use the same office and the same people work for them?

A. Yes.

Q. They occupy the same office building and everything of that kind? A. Yes, sir.

Q. In this case the Indemnity Company put up the bond, the Insurance Company writes the insurance? A. Yes.

Q. You have seen the letter from the Industrial Accident Board calling attention to the fact that they had the matter referred to them in regard to the fact that the Insurance Company had no right to write compensation policies? A. Yes, sir.

(Testimony of George E. Peterson.)

Q. You knew about that? A. Yes, sir.

Mr. Horowitz: The stipulation admits that the defendant companies had the right to write these policies, and I submit it is immaterial.

The Court: He may answer.

A. I saw the correspondence.

Q. (Mr. Whitla, continuing): Can you give us any explanation as to why a company not authorized to write this was so writing?

A. The two companies are one and the same for all intents and purposes, and it was intended to write this in accordance with the requirements. The bond was furnished in compliance with the law so as to qualify them.

Q. That is the only explanation that you know of? A. Yes, sir.

Q. I was just wondering if there was any reason why it should be done that way other than that explanation? A. I don't know of any.

Q. There has been introduced in evidence two accounts, from April 10 to January 2nd, 1943, and another from April 10 to July 25, 1942. The first one, from April 10 to July 25th is marked "Corrected Account." Now, what is that a correction of, or what is it corrected from?

A. It is a correction of the previous audit for the same period. [212]

Q. Do you have some book that these accounts were taken from?

A. Well, the books are the records as taken from the assured's books by our field auditor that services the risk.

(Testimony of George E. Peterson.)

Q. In compensation insurance you send an auditor out to audit the payrolls of the assured?

A. Yes, sir.

Q. You get the classification of the men's work and you bring it to the auditor and you get the number of hours in that line of work that all the men have worked, and you multiply that by the rate and that is the charge? A. Yes.

Q. And that is the way you arrive at the compensation premium? A. Yes, sir.

Q. That is the regular rate of insurance, and that is the procedure that insurance companies follow? A. Yes.

Q. There was some correction made from the original audit, can you tell what it was?

A. There were some errors on the assured's books. You see we had an auditor on this job continuously. He lived right on the job, and many of these things were called to his attention by Butler's bookkeeper, and in reviewing the [213] records an opportunity was given to correct the errors, and this represents the correction.

Q. This was superseding,—does it supersede No. 9,—Exhibit No. 4, does it supersede Exhibit No. 9?

A. In scope, it does. It extends beyond that period. It goes to a period of time which also includes that.

Q. As a matter of fact, Exhibit No. 9 is included in Exhibit No. 4? It is included in Plaintiff's Exhibit No. 4 which brings it to a later date?

A. That is right.

(Testimony of George E. Peterson.)

Q. Then No. 9 is of no use in this case for any purpose?

A. I think so. It might raise a question in regard to premiums as earned between certain dates.

Q. It is just a period accounting instead of a full accounting? A. That is right.

Q. Do you know of any reason it would make any difference in this case?

A. No; I don't know of any.

Q. Is there any reason why when they submit a corrected one why they didn't submit the original one?

A. Well, it is customary that the last one is the one that you go by.

Q. You submitted a corrected one. That was a periodical [214] one, but you did not submit the original?

Mr. Horowitz: I object to this going in, because it simply encumbers the record and is of no value.

The Court: He may continue.

Q. (Mr. Whitla, continuing): I will ask you, do you know of any reason why Defendants' Exhibit No. 9 is of any material value in this case?

Mr. Horowitz: I think this is a legal question, rather than a question for the witness.

The Court: He may answer.

A. You may want to determine the premium for a certain period, and this would permit the doing of that.

Q. Do you know why that should be done in this case?

(Testimony of George E. Peterson.)

A. You have a break-down of the payroll by periods for the purpose of splitting your returns to the Industrial Commission.

Q. That covers what date?

A. July 25th, 1942.

Q. Did you make any return to the Industrial Accident Board covering that period, showing any amount of premium earned up to that time?

A. It is one of the reasons that you would need it.

Q. You make your report to the Accident Board, but you don't make it on the earned premium, but the premium collected [215] to a certain date?

A. That is right.

Q. And that has nothing to do with the premium collected? A. That is right.

Q. Then it would not be of any benefit in making a return to the Industrial Accident Board?

A. Part of it would, depending on when the premium was paid.

Q. Do you know when the premium was paid?

A. No, sir.

Q. Now, just so there is no misunderstanding, Plaintiff's Exhibit No. 4 is a complete payroll audit corrected so far as you know on the Walter Butler Construction Company under the policies in controversy here?

A. For a part of the period, April 10 to January 2, 1943.

Q. You have this carrying it down to April 13, 1945? A. That is right. It is complete.

(Testimony of George E. Peterson.)

Q. The policy in this case, when is Defendants' Exhibit No. 8, is shown here as Plaintiffs No. 1, is it not? A. Yes, sir.

Q. And that contains the insurance agreement between the parties made on that date?

A. Yes, sir; on the compensation.

Q. Omitting the certificate at the top of the policy, [216] I call your attention to the various endorsements on it, beginning on page one, and now then, Mr. Peterson, that is nothing but the printed form,—no endorsements? A. That is right.

Q. Page number two is a printed form and has the names of the officers of the company printed on it, and countersigned by Mr. Ware?

A. That is right.

Q. Beginning with the matters on the policy at the time it was written, the declaration of the policy and the number of the policy, or the endorsements, the first endorsement is number 3013?

A. Yes, sir.

Q. And the next one is endorsement, or schedule, 2921, and that is referred to on the policy?

A. Yes, sir.

Q. And the next one is 2776? A. Yes, sir.

Q. And then following it down, the next endorsement is 3031 again? A. Yes, sir.

Q. On the back of the policy it gives the name of the company issuing it, and the date of expiration? A. Yes, sir. [217]

Q. And the person to whom it is issued?

A. Yes, sir.

(Testimony of George E. Peterson.)

Q. There is nothing in that policy to endorsement No. 3016. No. 3016 is not mentioned in that policy, is it, that is, leaving out the certificate at the top, which was not a part of the policy?

A. That is the certification of the assistant secretary, and it certifies that 3016 is a part of the policy.

Q. That was put on later. There is nothing in the policy itself showing 3016 as an endorsement?

A. I don't see why you should separate it.

Q. That was for the purpose of certifying the papers for use in this case?

A. That is the customary procedure.

Q. But that is not a part of the policy?

A. This endorsement was on there.

Q. It is like the other endorsement that you have which is numbered and certified as correct by the auditor, or the assistant secretary? A. Yes.

Q. And in none of the others does it refer to what is in there? A. But it was on there.

Q. I asked you if, without that certificate, there is [218] anything that shows that endorsement 3016 is endorsed on the policy? A. No.

Q. Not a thing? A. No, sir.

Q. Now then, this Defendants' Exhibit No. 19 you say is a binder that was issued,—that is for the casualty insurance?

A. It takes the compensation.

Q. That was issued as of the date it bears?

A. Yes, sir.

Q. That is a regular thing when you issue a

(Testimony of George E. Peterson.)

policy and cannot get the policy out immediately, you issue a binder until the policy can be properly signed and delivered? A. Yes, sir.

Q. And that is what this was issued for?

A. Yes, sir.

Q. And that was the entire agreement up to that time? A. Yes, sir.

Q. And that was submitted to you by the Acme Brokerage Company? A. Yes, sir.

Q. Following that you prepared a policy in the Home Office at Hartford, Connecticut, and sent it to your agent at Coeur [219] d'Alene to be counter-signed? A. Yes, sir.

Q. You sent it out in an envelope enclosing another envelope to return it, and asked for prompt service? A. That is the usual procedure.

Q. And you received back this Defendants' Exhibit No. 20 under date of May 25th, returning the three policies signed by E. Thomas?

A. Yes, sir.

Q. She was to sign the policies with Mr. Ware, that is, she had authority to countersign? She was an employee in his office?

Mr. Horowitz: I submit the best evidence would be the power of attorney.

Q. (Mr. Whitla, continuing): The bond was included in this matter? A. It followed.

Q. Wasn't it included, and didn't you ask them to see that the bond was filed with the proper officials of the state of Idaho? A. I think so.

Q. And they returned the policy and sent the bond to the state of Idaho for filing? A. Yes.

(Testimony of George E. Peterson.)

Q. You knew the bond was a prerequisite?

A. Yes, sir.

Q. You sent a wire to hurry up the policy, or something to that effect?

A. I think there was a wire.

Q. Under the date of May 29th you received Exhibit No. 21 stating what they had done, that they had returned the policy in the same envelope, not by airmail but by regular postage?

A. That is correct.

Q. And this letter refers to the three principal policies involved in this case?

A. Yes, sir.

Q. Now after this proposition, this writing to the Industrial Accident Board calling attention to the fact that you claimed a refund, you never did anything further?

Mr. Horowitz: That is covered by the stipulation.

Q. (Mr. Whitla, continuing): After the application for the refund you did proceed to file your reports with the state of Idaho for several years, paying one per cent tax to the Industrial Accident Board for compensation insurance?

A. Yes, sir.

Q. And that amounted to a good many thousands of dollars? [221]

A. It amounted to thousands.

Q. You paid five or six thousand dollars after that?

A. Something like that; yes.

Q. Now the man, or men, that you paid commissions to for some of the policies issued later was

(Testimony of George E. Peterson.)

the Acme Brokerage, the same ones that had been Walter Butler's insurance adviser?

A. Yes, sir.

Q. That was a small amount, about \$12.48, I believe you testified? A. Yes.

Q. And on this insurance rating that you testified about, I believe you acted on some commission helping to set up this plan?

A. No, sir; I was appointed to a committee to administer it.

Q. It was established in 1941 before the war?

A. Yes, I think so.

Q. The comprehensive insurance rating plan shows August 18th, 1941. Would you say that was about the approximate date?

A. It was established before that, because the Navy adopted the plan from the War Department, or after the War Department. [222]

Q. This is not the War Department plan. They have a different plan?

A. Well, you cannot tell them apart.

Q. But the two departments have considerable difficulty about that?

A. No; they are very much the same in major points.

Q. How long did you act on the committee to administer this plan?

A. From its inception to the completion of the war; in fact, we had several meetings after that.

Q. From the inception of the war?

A. No; the inception of the plan.

(Testimony of George E. Peterson.)

Q. On August 18th, 1941?

A. I think it was prior to August, 1941. We had some meetings prior to that with the War Department.

Q. Will you tell us when?

A. We had some meetings with the War Department after the close of the war.

Q. Well, Mr. Peterson, at the same time you were acting on the committee you were also assistant secretary of this department that you mentioned of the defendant company?

A. I became secretary of the department.

Q. You held that position during all of the time that you were on the committee to administer these rules, or this [223] plan?

A. Yes, sir.

Mr. Whitla: That is all at this time.

Redirect Examination

By Mr. Horowitz:

Q. Now with reference to this committee, just give an idea to the Court of what it was—will you tell us what other representatives were on the committee?

A. Representatives from mutual and stock companies. They were there in equal representation. It was set up at the request of the War Department and joined later by other Government agencies adopting the plan, and they attended these meetings. The understanding was with the Army and Navy and these other agencies that they would attend.

(Testimony of George E. Peterson.)

Q. What was the practice with reference to the meetings?

A. No meeting would be held until there was in attendance representatives of these agencies.

Q. What companies had representatives there on that committee?

A. The Liberty Mutual, the American Mutual, the Lumbermen's Mutual, the Globe Indemnity Company, the Employers Liability Insurance Corporation and the Travelers Company.

Q. Is there any secrets as to who the individuals were, [224] and who they represented?

A. No, sir.

Q. You mentioned, I think, that there was an equal representation of the mutual and stock companies?

A. Yes, sir.

Q. And what were the stock companies?

A. The Employers, the Globe and the Travelers.

Q. The Court asked you about the sum of \$7,730.00 shown as still owing as a result of the computations. Is that some of the returned premium corresponding in character to the \$440,000.00 some odd dollars?

A. It is developed in the same manner.

Q. Didn't the companies concede that that was still owing the Navy as assignee?

A. Yes, sir.

Q. If in this case the Travelers were required to pay the commission, would they be reimbursed?

Mr. Whitla: That is objected to as incompetent, irrelevant and immaterial, if the Court please.

The Court: He may answer.

(Testimony of George E. Peterson.)

A. I have been told no.

Q. By whom? A. By Navy officials.

Q. In your testimony relative to the letters in the [225] Cashier's file, you were about to answer, and you started to say you knew personally, or that you knew about something and you were interrupted. Was there something that you wanted to add relative to the communications?

A. I wanted to bring out the fact that being in Hartford and having a private wire between our New York office and Hartford, the procedure was to contact me personally, and I was contacted by the New York office, at the request of the Acme Brokerage Corporation to give them some information.

Q. Mr. Whitla said something about the Lumbermen's Mutual writing a premium business of five hundred and fifty million? A. Yes.

Q. What was the name of that company?

A. The Lumbermen's Mutual Casualty. There are five or six——

Q. (Interposing): Mr. Peterson, will you just refer to the publication that you testified to and turn to the Lumbermen's? A. Yes, sir.

Mr. Whitla: That was Best's Manual that I referred to.

Q. And——

Mr. Horowitz: This points out that it did [226] \$36,120,981.00 in premiums—about thirty-six million or a little over. It is not important but I wanted to clear that up.

(Testimony of George E. Peterson.)

Q. (Mr. Horowitz, continuing): And you said something, Mr. Peterson, also about some companies operating on both bases. What did you mean by both bases?

A. Mutual companies use both the commission plan and private solicitation with their own employees.

Q. Now, will you refer to Defendants' Exhibit No. 9, and to Plaintiff's Exhibit No. 4? Defendants' Exhibit No. 9 is known as the corrected audit, and Plaintiff's Exhibit No. 4 is known as the superseding audit. You testified, I believe, that Defendants' Exhibit 9 covers part of the period covered by Plaintiff's Exhibit No. 4? A. Yes, sir.

Q. Are there differences in figures in some instances between Defendants' Exhibit No. 9, and Plaintiff's Exhibit No. 4 for the same period?

A. Yes.

Q. In order to get the history of this transaction as it developed day by day under these three policies, would it be necessary to get both the corrected audit and the superseding audit?

A. It would seem proper and desirable. [227]

Q. Do not these two audits constitute steps in the computation of the premiums under these three policies?

A. In the premiums, yes, sir; and they facilitate the premium billing.

Q. If you want to know the amount of the interim payments under a period you look at one audit? A. Yes, sir.

(Testimony of George E. Peterson.)

Q. And if you want to know it for a different period you look at the other? A. Yes, sir.

Q. Now, referring to Exhibit No. 8 containing the policies in question, there is a certificate on the copy which was furnished, and which appears on that policy. Will you tell us from what Home Office records were these made up?

A. From the absolute duplicate of the original policy.

Q. Have you that Home Office record?

A. Yes, sir.

Q. Will you please produce it?

A. Yes, sir.

Q. Now, turn to it—I hand you Defendants' Exhibit No. 24, marked for identification. Will you tell me what it is?

(Whereupon Defendants' Exhibit 24 being document referred to was marked for identification.)

A. It is an exact duplicate made from which the original [228] policy was made.

Q. What is the Home Office practice in reference to keeping the Home Office record which shows the policy endorsement?

A. The practice is to retain an exact duplicate in the Home Office showing in the endorsement space what is the endorsement attached to the original policy at the time of the issuance.

Q. Was that instrument, Exhibit No. 24, made in the regular course of business pursuant to the practice that you testified to? A. Yes, sir.

(Testimony of George E. Peterson.)

Q. Has that instrument been in your Home Office since the policy was issued? A. Yes, sir.

Q. And does that refer to endorsement 3016 as having been attached to the policy at the time of its issuance? A. It does.

Mr. Horowitz: I offer exhibit No. 24 in evidence at this time.

Mr. Whitla: This is an office copy of the policy?

A. It is an exact duplicate of the office copy of the printed-in portion of the policy.

Mr. Whitla: Why is it that this policy which you [229] submit as a copy is not the same as this (indicating)?

A. This is a skeleton; the other is the policy.

Mr. Whitla: The policy does not contain the same things that are contained, and this is what you say is the Home Office copy of the policy?

A. It contains everything except that which is for Home Office use.

Mr. Whitla: This endorsement was not on the original policy as sent out?

A. It is not the practice.

Mr. Whitla: That endorsement referring to the number of the endorsement was not on the original?

A. Not noted on the policy. Neither was the other matter there.

Mr. Whitla: This was something that someone in the office put on after the policy was issued?

A. No; it is put on before the policy was issued.

Mr. Whitla: It is put on before the policy was issued? A. Yes.

(Testimony of George E. Peterson.)

Mr. Whitla: On your Home Office records?

A. This is the original. Under the way we operate the policy is not the original.

Mr. Whitla: It constitutes the contract which you [230] give to the assured?

A. This instrument is typed with a certain type of ribbon that permits us to put in what we call a jelly machine, and then we run out as many copies as we want, and you can mask out—as we do—any details that are for the Home Office, and this is what comes out of the typewriter. You will find the items—barring the top here (indicating)—is a duplicate of the policy, or, rather, it is duplicated on the policy.

Mr. Whitla: Down to Item No. 1 is what you claim is for the Home Office? A. Yes.

Mr. Whitla: And that was not on the original policy? A. That is right.

Mr. Whitla: We object to this as incompetent, irrelevant and immaterial. It is entirely immaterial regarding the items that are not shown on the policy.

The Court: I will admit the exhibit. I think perhaps you are possibly correct, though.

(Whereupon, Defendants' Exhibit 24 for identification was admitted in evidence.)

Q. (Mr. Horowitz, continuing): Turning now to Exhibit No. 8— [231]

The Court: Before you start, Mr. Horowitz, we will recess at this time until two o'clock.

(Testimony of George E. Peterson.)

2:00 P.M.

Q. (By Mr. Horowitz): Mr. Peterson, there was some testimony given on cross-examination before lunch relative to whether the war rating plan endorsement was a part of the policy. I understood counsel to ask if the endorsement was a part of the policy, and I think you said that it was not.

Mr. Whitla: That it was not mentioned in the policy.

Mr. Horowitz: All right.

Q. At the time the policy was issued, what was the practice of the company in respect to mentioning endorsement numbers, or schedule numbers, in this form of policy?

Mr. Whitla: We object to that. The statute of Idaho requires them to be inserted in the contract.

A. It was the practice of the company to not put on this policy certain endorsement numbers, but to have them on the Home Office copy, as I showed this morning.

Q. Taket this first one, this item one, "Walter Butler Company, C.P.F.F., contractor with the U.S.A. and others, as described in endorsement 3013," what was the function of that reference?

Mr. Whitla: We object to this. It is in the policy.

The Court: This man is an expert, and is here as an expert. I will permit him to answer.

Q. What was the function of that reference?

A. To indicate who was to be named, the full

(Testimony of George E. Peterson.)

title of the risk, as it is shown there, the Walter Butler, and others, as described in the endorsement.

Q. Endorsement 3031 is to indicate the additional assured on the policy? A. Yes, sir.

Q. What is the reason for schedule 2921?

A. That is the filling out of the classification; where we have to use a schedule to cover the entire classification we insert this space where these items would be the statement 2921.

Q. Is it the practice to refer to the schedule by number, and was it the practice at that time?

A. Yes, sir; it was.

Q. And in item No. 7 on this exhibit there is a reference following the signature, "Walter Butler Company, C.P.F.F. Contractor with the U.S.A. and others as described in endorsement 3013, proposal dated May 18, 1942." What is the function of that reference? [233]

A. That is the signature of the various people involved as embodied in the policy.

Q. There isn't enough room to supply the data?

A. That is right, not in that schedule.

Q. Is there a space in this policy expressly provided, or specifically provided, for inserting the war projects rating plan endorsement?

A. No, nothing except as it applies covering the items I have covered in the schedules and endorsements.

Q. The Travers Company had written a number of compensation policies? A. Yes.

Q. What was the practice in respect to each of

(Testimony of George E. Peterson.)

these using these forms in inserting the number of the comprehensive plan endorsement?

A. There was no space provided. It cannot appear on the policy.

Q. Now, will you turn to any instrument in this exhibit which shows that the comprehensive rating plan was attached to and a part of the policy at the time it was issued?

A. Here is one right here (indicating).

Mr. Horowitz: Let us have it marked.

(Whereupon, document referred to was marked Defendants' Exhibit "A" in Defendants' Exhibit 8.) [234]

Q. I refer you now to the instrument marked for identification with the letter "A" in Defendants' Exhibit No. 8, the rider being marked 1721 according to the company's method. To what do you have reference?

A. It ties in here (indicating). Here it is, the entire paragraph 1-H-3016. This endorsement shows the schedule, tax multipliers for the state of Washington.

Q. What is the date of that?

A. Issued September 10, 1942, effective as of April 10.

Q. What was the date of the issue on the instrument? A. September 10, 1942.

Q. Is there anything else there that shows the endorsement was a part of the policy, that is, compensation policy?

(Testimony of George E. Peterson.)

A. Here is the comprehensive liability policy, one of the three, WSLG-863387. That policy shows that endorsement 3014 is a part of it. I think that is the corresponding endorsement.

Q. Turn now to 3014, and refer us therein to some statement which shows that the War Projects Rating Plan was a part of the compensation policy.

A. Paragraph 11 on page two of that endorsement, under the caption "Premium Adjustments," particularly for this policy, "The premium for this policy is to be computed in accordance with the provisions of the War Projects Insurance Rating Plan endorsement, forming a part of policy No. WUB-863386." [235]

Q. And is the date of the issue of that policy the same as the issue date of the compensation policy?

A. Both are issued on the same date, May 18th.

Q. Why is it, Mr. Peterson, the compensation policy has no specific reference to 3016, whereas in this policy there is specific reference? Now, look at the endorsement 3014.

A. There are two different parts of that endorsement. You will see under paragraph "C" at the bottom of the page, "Cancellation by the company shall not be effective unless a copy of the notice of cancellation is mailed to the Navy Department, office of Procurement and Material Insurance Division, Washington, D. C."

Mr. Whitla: Does it have a date of issue on it?

A. No, sir; it doesn't. That constitutes page

(Testimony of George E. Peterson.)

one of this endorsement 3014, and that was attached to the policy at the time it was issued. Subsequently, change was requested as the records changed cancellation provision was made as to give notice to the officer in charge of the construction here at the location of the work. You will notice in all other respects it conforms with the original issue which shows no date in the border, which is in accordance with the practice, and which is confirmed as a matter of fact by the provisions of this particular policy wherein all symbols, or symbol numbers [236] of the endorsement forming a part of the policy on its effective date shows the endorsement that 3014 was attached thereto.

Q. Now, my question, Mr. Peterson, why is it that under your practice at that time endorsement 3014 appears on this and does not appear on the form of the compensation policy?

A. The plain outlined here in regard to WSLG policy had not been extended to the compensation policy at that time.

Q. Now, with reference to the form used, was there anything in the nature of the forms that caused the insertion?

A. Yes; the form here is so spaced that this entry was provided for. The other did not.

Q. Was this a revised form?

A. Yes, sir; it was revision of practice.

Q. And the other was not? A. Yes, sir.

Q. Is that your explanation? A. Yes.

(Testimony of George E. Peterson.)

Q. Now, turn to the third policy, is there any reference in policy WSLA-863388 to the War Projects Rating Plan endorsement?

A. We have here the same situation as applies to policy WSLG. That was attached to this policy at the time it was issued—reference to the premium adjustment under the War Project Rating Plan, and specifically mentioning as being [237] added, and along with policy WUB-863386, being the compensation policy.

Q. Is the issue date of that policy the same as the issue date of the other two?

A. Yes, sir; it is exactly the same date.

Q. In addition to these pages to which you have testified as showing that the War Projects Rating Plan is a part of the compensation policy, what else do you base your testimony on that it was a part of that compensation policy?

A. It starts in the very beginning, negotiations made with me personally. I went into the Navy Department and they would not have been interested in this unless it was on that basis, and after that deposit of premium was specified as being in connection with such contract, and advances made from time to time, which were made on that basis all the way through, and the binder itself is on that basis.

Q. What about the Home Office records?

A. That to me is absolute proof, so far as I am concerned, of the matter of practice.

Q. And what is your testimony to the Court as

(Testimony of George E. Peterson.)

to whether the War Project Rating Plan was a part of the compensation policy at the time of its issue—was it, or was it not?

Mr. Whitla: We object to that. He has given his reasons, and is now asked for an opinion. It is for your Honor to draw his conclusion from the testimony. [238]

The Court: I will permit him to answer.

A. My answer is positively that this was attached to the policy and formed a part of it, WUB-863386, at the time it was issued.

Mr. Horowitz: My attention has been called to the fact that there is another Exhibit marked with the letter "A." Plaintiff offered it in Defendants' Exhibit No. 8—he offered "A," "B" and "C." I wonder if we can agree that the letter "Z" can be substituted for the letter "A." I will ask the Clerk to strike a line through the letter "A."

The Court: Very well. The Clerk may make the change.

Mr. Horowitz: Now, the Clerk has drawn a line through the letter "A." It has a line marked through.

Q. (By Mr. Horowitz): There is some question that has arisen as to the function of this committee that you testified to. Will you please tell the Court the nature of the administrative problems considered by that committee?

Mr. Whitla: I object to it as wholly immaterial. What the committee did, that might be admissible, but the nature of the administrative problems as he sees them would not be admissible.

(Testimony of George E. Peterson.)

Mr. Horowitz: I think there was some inference cast by counsel on this committee, or the actions of the [239] committee——

The Court: Yes, I think counsel for the plaintiff did cast some inference or aspersion.

Q. (Mr. Horowitz, continuing): What was the nature of the problems considered by the committee?

A. Well, they dealt with the rules and regulations that developed as the plan became operative. We had risks in the manufacturing group that were engaged in some part of the operation, and some operations were on a fixed fee basis, and in some cases the situation was never divisible. The question was whether we could extend the plan to cover what we might call just normal work. Another had to do with a multiplicity of details which extended to the auditing of hundreds of classification, many of which had only small pay rolls, each rated separately. The question, can we get an average rate? And I could go on and tell you more and more, but that was typical of the work that this committee did.

Q. Did this committee make any recommendations as to the placing of insurance with any company?

A. No, sir; they could not, and would not.

Q. Did they recommend the placing of any insurance with the Travelers under the War Projects rating plan, or any other plan? A. Never did.

Q. Some reference was made by Mr. Whitla on cross-examination of what he characterized as a payment of five or six thousand dollar premium taxes

(Testimony of George E. Peterson.)

after the Travelers had made claim for a refund. In the first place, what was the correct amount, Mr. Peterson? A. Some twenty-eight hundred.

Q. In the second place, what, if anything, was received in connection with that payment after the claim for refund?

A. We were advised by counsel that we could not claim a refund in connection with the previous year's taxes. The taxes for one year having been paid, we could not take out of that tax anything that would indicate an overpayment on the subsequent year.

Q. You could not take credit in a subsequent year for payments in any previous year?

A. That is right.

Q. The overpayment to which claim for refund was made had reference to the overpayment on War Projects Rates Plan?

A. They were combined.

Q. The amount of twenty-eight hundred dollars was the amount paid for the period prior to 1945 and 1946?

A. For the year ending December 31st, 1944.

Mr. Horowitz: You may inquire.

Recross-Examination

By Mr. Whitla:

Q. Calling your attention to Exhibit No. 27 of the photostatic exhibit, I call your attention to a letter written February 28th, 1944, to the Directors of Insurance enclosing check for \$6,952.20 for taxes.

(Testimony of George E. Peterson.)

That was written by your company, and a check for that amount was enclosed on that date?

A. Yes, sir.

Q. And——

Mr. Horowitz: What did you say as to that amount, Mr. Whitla?

Mr. Whitla: It shows the enclosing of a check amount to \$6,952.20.

Mr. Horowitz: Just a minute. Mr. Peterson, what was the amount of the tax there?

A. \$208.57.

Mr. Horowitz: That is considerably different.

Mr. Whitla: I ask to have this sheet numbered four marked as Plaintiff's Exhibit No. 25.

(Whereupon, document referred to was marked Plaintiff's Exhibit 25, for purposes of identification.)

Mr. Whitla: And now, I will ask if the Travelers Insurance Company received that letter from the Department, or the Bureau of Insurance of the State of Idaho? [242]

Mr. Horowitz: That letter is dated April 10th, 1945.

A. Yes.

Q. That made a demand on you for \$3,178.23?

A. Yes, sir.

Q. I will ask you whether or not that was sent on March 15th covering premiums on that matter?

A. Yes, sir.

Q. That would be the workmen's compensation premium? A. And also the life premium.

(Testimony of George E. Peterson.)

Q. The life premium was \$29,970.21, and also the workmen's compensation premium, \$75,970.83, upon which taxes of three per cent was paid at that time?

A. That is right.

Mr. Whitla: I offer these in evidence.

The Court: Is there any objection?

Mr. Horowitz: No objection.

The Court: Admitted.

(Whereupon Plaintiff's Exhibit 25 for identification was admitted in evidence.)

Mr. Horowitz: You didn't refer to all of that as workmen's compensation claims?

Mr. Whitla: Yes.

Mr. Horowitz: Accidents, health, personal liability and workmen's compensation premiums, [243] \$75,970.73.

Q. (Mr. Whitla, Continuing): I now hand you Plaintiff's Exhibit No. 27, being sheet No. 7 of the photostatic exhibit, showing the payment to the Bureau of Insurance on premiums in the amount of \$75,970.83, in the sum of \$2,279.12, do you know if that is correct for the year ending December 31st, 1944?

(Whereupon Plaintiff's Exhibit No. 27, being the document referred to, was marked for identification.)

A. This is just a bill.

Q. A statement that you make to the Bureau of Insurance when you remit your taxes?

A. That is right.

(Testimony of George E. Peterson.)

Mr. Whitla: I now ask to have this instrument marked 7-A, and I offer No. 7 in evidence.

Mr. Horowitz: No objection.

The Court: Admitted.

Mr. Whitla: Now that this has been marked 7-A,—I should say 27-A. I will offer it.

(Whereupon Plaintiff's Exhibit 27, for identification, was admitted in evidence.)

Mr. Horowitz: No objection.

The Court: Admitted.

(Whereupon document referred to was marked Plaintiff's Exhibit 27-A, and admitted in evidence.) [244]

The Court: You had some agents that write insurance on a commission basis?

A. Yes, sir.

The Court: Where they are being paid a percentage on these commissions,—or the premiums, is the premium in its entirety as the amount on which the commission is paid, or is it after the tax is paid?

A. The tax is superimposed upon the premium before you apply the commission.

The Court: The agent would not have to take the net premiums after the taxes on the premium were paid as the basis to figure his commission?

A. He gets a commission as the premium is set up in the state for tax purposes.

The Court: Regardless of the taxes?

A. Yes, sir.

(Testimony of George E. Peterson.)

The Court: You don't deduct the taxes from the premiums or the amount of premiums on which you pay commissions?

A. No; he is usually paid on the gross premium, which includes the tax. He is paid the commission on the gross premium.

The Court: Just one more item: I think you have introduced checks here in which you tell me that \$340.00 was [245] paid to Mr. Ware during this time. Was that the full amount paid to Ware during this period, or was he paid some other commissions?

A. That was the total amount paid to Mr. Ware in connection with the premiums for this function, that is, for this countersigning.

The Court: Did you pay him any other money for the performance of any function?

A. If he produced any business directly.

The Court: Did he do that, or was he paid anything?

A. I think we have a record of a single instance.

The Court: But that is not included in this action at all?

A. No.

The Court: That is all I have to ask this witness at this time.

Q. (Mr. Whitla, Continuing): These checks introduced run up until the month in which these policies were issued for alleged performance before that date?

(Testimony of George E. Peterson.)

Mr. Horowitz: You say until the month in which they were issued?

Mr. Whitla: Until the month.

Mr. Horowitz: There is a check here in May.

Q. (Mr. Whitla, Continuing): Let me put it this way: [246] These checks begin on October 22nd, 1936, and run through until May 11th, 1942, and that is the only checks which cover that time, that it between those dates?

Mr. Horowitz: You are referring to the dates of the checks?

Mr. Whitla: Referring to the period. The dates are, the first beginning October, 1936, and the last being on May 11th, 1942.

A. I would say no to that question.

Q. Why?

A. It is my understanding that the date on the check does not correspond with the date of service.

Q. When was the service?

A. It began in October, and the check for October was for that month.

Q. Then you say the May check would be for the month of May? A. Yes.

Q. The policy was endorsed some time after the 11th of May, 1942?

A. I don't know quite what the check is. I will have to see when it was endorsed.

Q. I am saying that the policy was written on May 18th? A. Yes, sir. [247]

The Court: Were all of these policies written after the date of the last check?

(Testimony of George E. Peterson.)

A. Every one of them.

The Court: That is admitted, is it?

Mr. Horowitz: No; the witness has just testified, your Honor, that the check dated on May 11th, 1942, was for the entire month of May.

The Court: Wouldn't that be for the month preceding?

Mr. Horowitz: No.

The Court: You say that you pay in advance, do you?

Mr. Horowitz: We have a check there for every month.

Mr. Horowitz: This defendants' Exhibit No. 7 says: "Dear Mr. Ware: Yesterday Field Assistant Gilbert sent you new contract forms to sign in view of the fact that he inadvertently used the wrong form when he secured your signature during his personal visit to Coeur d'Alene last month.

"Following Mr. Gilbert's explanation of our proposed arrangement to reimburse an Idaho agency for handling a small amount of countersigning that will be necessary from time to time, I recommend to our Home Office that your [248] agency be recognized in this manner. I am now in receipt of advices that your agency has been approved for this service as of October 1st, 1936. On the basis of a monthly remuneration of \$5.00, payment for the month of October will be forwarded as of November 1st by the auditor, and a like amount each month thereafter until otherwise advised."

Mr. Horowitz: The first check is October 22nd,

(Testimony of George E. Peterson.)

and there is a check for every single month including a check for May.

The Court: That check was dated May 11th?

Mr. Horowitz: Yes.

Mr. Whitla: And it says here——

The Court: I think possibly you gentlemen should let the witness testify. You do have him on the stand, and what I am trying to get at is whether this money was in payment of any service in connection with the policies embraced in this action.

Mr. Whitla: This letter provides that you pay in November for October?

A. Yes.

Q. (Mr. Whitla, Continuing): The checks coming in was for the payment of the month back?

A. There wasn't any check for November 1st.

Q. The letter said that on November 1st the check would [249] be mailed for the October payment?

A. I would like to see the check. It is my understanding that the checks commencing with this one, October 22nd—these checks will show, I believe. I have reviewed all of that from month to month, and it was paid, because we have one for every month, including the month of May at the time this policy was issued in 1942.

The Court: Then under that program you paid in advance?

A. It is purely a matter of seeing the number of checks there, and the number of months that they were in payment of. It would prove the point.

(Testimony of George E. Peterson.)

The Court: I was simply trying to find out what Mr. Ware had been paid, if anything, in connection with these policies. He is being paid for work he did in connection with the countersigning of these policies, and now, if I have it right, Mr Ware has not been paid anything since immediately prior to the countersigning of the policies. He never received anything for countersigning these policies.

Mr. Horowitz: No, your Honor, that is definitely not so.

The Court: The checks were given before these policies were issued, and if all of them were given to him before these policies were issued, and no other amount was [250] paid to Mr. Ware, he hasn't received anything for countersigning these policies.

Mr. Horowitz: I think he has answered the question. However, I will ask this: Referring now to check dated May 11th, 1942, what period of time is covered? What does that cover?

A. The month of May, 1942.

Mr. Horowitz: Does it cover the services for countersigning the first three policies here?

Mr. Whitla: We object to that. It could not be for those services.

The Court: Certainly, Mr. Whitla, if you were entitled to recover, you would have to deduct any amount you had been paid.

Mr. Horowitz: These checks have been numbered from one to sixty-eight, and there are sixty-eight months, a five-dollar check per month, and there are sixty-eight checks.

(Testimony of George E. Peterson.)

The Court: The only service that Mr. Ware performed for these checks was waiving the statute, or the statutory requirement of paying your agent in Idaho, and he was paid that amount for being your agent in Idaho, whether he did anything for you or not?

A. He countersigned policies other than these.

The Court: He countersigned other policies?

A. Yes, sir; several policies.

The Court: He was paid five dollars per month. Was he paid anything additional for signing these policies?

A. No, sir.

Q. (Mr. Whitla, resuming): These exhibits that I have called your attention to show more than five thousand dollars paid to the state for taxation after you claimed the refund in 1943 or 1944?

Mr. Horowitz: My question was as to the payment for 1944.

Mr. Whitla: The payment in 1945 is for 1944.

Mr. Horowitz: I understand.

Mr. Whitla: There were over three thousand—

Mr. Horowitz (Interposing): That is what he testified to, the amount of \$2279.12 tax for the accident department.

Mr. Whitla: If it shows for 1945,—no, for 1944, a payment of \$3,178.23, doesn't it?

A. May I make an observation?

Q. (Mr. Whitla, continuing): Whether you made payment of that tax at that time, or not, you can answer?

(Testimony of George E. Peterson.)

A. This is a request for the payment of the taxes.

Q. Now, follow that up, in Exhibit No. 26 you made remittance for that? [252]

(Whereupon document referred to was marked Plaintiff's Exhibit 26 for purposes of identification.)

A. Yes, we did.

Q. Now then, Mr. Peterson, endorsement which has the company number 3015 on the policy WSLA-863388 contains two pages, does it not?

A. Yes, sir; in fact there are three pages.

Q. The first is complete in itself with the signature of the secretary of the Liability & Compensation Department and the General Secretary?

A. That is right.

Q. That is the first endorsement and shows the date of issue? A. Yes, sir.

Q. And what is that?

A. June 29, 1942.

Q. It was put in June 29th, 1942?

A. That part of the endorsement was.

Q. And the next endorsement, is that a continuation of the same endorsement?

A. That is the original endorsement.

Q. Why do you say that?

A. It bears no notation. It was issued at the time the policy was issued. [253]

Q. That is the only reason?

A. No; it is not. It is shown in there.

Q. It is shown in the policy itself?

(Testimony of George E. Peterson.)

A. Yes, sir.

Q. You say it is the second page, rather than the first two pages, that show that?

A. It was revised for the reason that I have mentioned.

Q. The revision of the second page, is that it?

A. There is a revision,—originally it called for the notice of cancellation by the company, and subsequently it became necessary to extend that to the contracting officers, which was not called for in the original endorsement.

Q. It has some other matters, that is, endorsement 3015 on there, doesn't it? A. Yes, sir.

Q. That is the only reason you have to give for this War Projects rating being attached to that policy at that time?

Mr. Horowitz: Which policy now are you talking about, Mr. Whitla?

Mr. Whitla: The only one we are talking about.

Q. Is that the WSLA policy?

A. This endorsement is on the policy. It appears that it was on the face of the policy. It indicates the symbol number of the endorsement forming a part of the policy on [254] its effective date.

Q. All that said is that under the provision of the War Projects Rating endorsement formed a part of policy WUB-863386?

A. That is a part of the same endorsement which was issued. This is page one, continued on page two. Page two was subsequently changed. That constitutes the endorsement attached to the policy when

(Testimony of George E. Peterson.)

issued. Page two was changed to make the extension of the cancellation provision.

Q. On these policies you had room to put the endorsement on, and you didn't have on the other?

A. It was a matter of change in procedure.

Q. Why was it that on the main policy you weren't able to put the endorsement in the policy?

A. They were in the policy.

Q. The endorsement is not specified in the policy?

A. It was not the practice of the company to do that.

Q. Why was it the practice to put in a part and not the balance?

A. No part except as they appeared as necessary.

Q. The rule was that you didn't put in the policy, the contract itself, any endorsements that you were attaching to it?

A. We put the endorsements in that constituted a part [255] of it. I have shown that they were attached.

Q. Did you put anything in this policy as to the endorsement you referred to as the War Project Rating 3016? If it is in that policy tell us where it is, the number, reference, or any reference in the contract part of that policy?

A. I have outlined that the practice of the company was——

Mr. Whitla: If the Court please, I have asked

(Testimony of George E. Peterson.)

him a fair, direct question. I don't think it is necessary to give any explanation.

The Court: You may answer, if you are able to. If you cannot answer, just say so.

Q. I asked you if you could *find in* the contract portion of the policy itself?

A. No; it is not in the contract portion.

The Court: We will recess at this time for ten minutes.

May 1st, 1947, 3:10 P.M.

Mr. Whitla: Exhibit marked Exhibit No. 26 was not admitted. I ask that it be admitted at this time.

Mr. Horowitz: We have no objection.

The Court: It may be admitted. [256]

(Whereupon Plaintiff's Exhibit 26 for identification, was admitted in evidence.)

Q. (Mr. Whitla, continuing): You stated that there was a difference in the figures between Exhibit No. 4 and Exhibit No. 9. Is there any other difference than the time on the payroll and the amount of figured compensation?

A. I would not be able to answer that without checking item for item.

Q. Will you point out the difference?

A. This covers a longer period of time.

Q. Besides that, you stated there was a difference in the figures?

A. I cannot tell that definitely item by item.

Q. You don't know whether there is a difference?
A. There may be different periods.

(Testimony of George E. Peterson.)

Q. That is admitted.

A. Well, that would be different.

Q. The amount of time worked and the amount of compensation?

A. This last covers more time.

Q. Aside from that you know of no difference?

A. That is right.

Q. I think you said something about taking from Best a list of casualty companies that paid no commission. Have [257] you that with you?

A. I had the Spectator chart.

Q. Did you count up to see how many paid commissions and what they did pay as shown there?

A. I did not.

Q. There is something like a hundred mutual companies that pay commissions?

A. I don't know.

Q. Turn to the Alleghany Mutual Casualty Company, and look at that and see if they pay commissions,—just look over that list and compare them and see if they are mutual companies and whether agent's commission.

The Court: If you think this is important, I suggest that you go ahead with something else and let him check it during the recess of the Court.

Mr. Whitla: That is agreeable. I think that is all I have of this witness.

Redirect Examination

By Mr. Horowitz:

Mr. Horowitz: This witness testified on my direct examination that instead of five thousand dol-

(Testimony of George E. Peterson.)

lar casualty premium being involved there was about twenty-eight hundred in 1944. Now, I will offer this whole exhibit. It is Defendant's Exhibit No. 28. [258]

(Whereupon documents referred to were marked Defendants' Exhibit 28 for purposes of identification.)

Mr. Horowitz: At this time I offer that exhibit, the photostatic pages of one to twenty-two, except for the sheets numbered four, five, seven and eight. I understand those have been offered in evidence by the plaintiff. Now I offer the balance of the sheets, containing, as they do, the entire taxes for the period ending December 31st, 1944, being a part of the copy furnished to counsel on his motion for inspection of the records.

Mr. Whitla: I have no objection.

The Court: It may be admitted.

(Whereupon Defendants' Exhibit 28, for identification, was admitted in evidence.)

Q. Handing you Defendants' Exhibit No. 28, I direct your attention to sheet No. 4 which has been admitted in evidence as Plaintiff's Exhibit No. 25, showing a total of \$3,178.23. I call attention to a letter, being Defendants' Exhibit No. 26,—rather, Plaintiff's Exhibit No. 26, and call your attention to the amount, \$3,178.23, which is shown in the letter of April 10th, 1945? A. Yes, sir.

Q. Now, in the first place, has there been included in that figure of \$3,178.23 anything for life insurance premium taxes? [259]

(Testimony of George E. Peterson.)

A. Yes, sir.

Q. What is that amount? A. \$899.11.

Q. And what was the total of the accident premium tax? A. \$2,279.12.

Q. And is that figure, \$2,279.12 included in the \$3,178.23?

A. Yes, sir; according to that, it is.

Q. I call your attention now to Exhibit No. 27—Plaintiff's Exhibit No. 27, I call your attention to the tax in the amount of \$2,279.12, is that the same figure referred to in the preceding letters, Plaintiff's Exhibits 25 and 26? A. Yes, sir.

Q. Exhibit No. 27-A, which is dated March 15th, 1945, returning tax by way of a check for \$138.37?

A. Yes, sir.

Q. That is correct? A. Yes, sir.

Q. Sheet No. 10 of the same exhibit, a return to the Tax Department, what is that tax?

A. \$138.37.

Q. Is that the same item I just asked about?

A. Yes, sir. [260]

Q. And sheet No. 11, a return to the Industrial Accident Board of the State of Idaho, that shows a tax in what amount? A. \$491.00.

Q. Calling your attention to sheet number twelve, the letter dated February 7th, 1945, that is a letter in reference to that tax,—what tax is referred to there? A. \$491.00.

Q. Is that the same \$491.00 to which you testified? A. Yes, sir.

(Testimony of George E. Peterson.)

Q. Turn to sheet No. 13, a notice of tax return, in what amount is that? A. \$491.00.

Q. Is that the same amount you testified to?

A. The same amount.

Q. Sheet number fifteen, which is a return by the Travelers Indemnity Company, what amount of tax is shown there? A. None.

Q. Sheet number seventeen of the same exhibit, dated August 7th, 1944, what is the amount of tax shown to be due the Industrial Accident Board?

A. \$12.24.

Q. Sheet No. 18, dated July 3, 1944,—I guess that is July 31st, 1944, what is the tax referred to there? [261] A. \$12.24.

Q. Is that the same item in that report which you testified to? A. Yes, sir.

Q. And sheet number nineteen, which is the return itself, in what amount is that tax shown?

A. \$12.24.

Q. And is that the same item that appears on the other sheets that you just testified to?

A. Yes, sir.

Q. And calling your attention to sheet number twenty-one of the same exhibit, the return of the Industrial Accident Board, what amount of tax is shown there? A. None.

Q. So that in this entire folder, after taking all the exhibits plaintiff has offered in evidence, what is the amount of tax for the period ending December 31st, 1944, for the accident or casualty department?

(Testimony of George E. Peterson.)

A. \$2,279.12, \$138.37; \$491.00 and \$12.24.

Q. Will you please total those amounts?

A. \$2,920.73.

Q. Now then, have you excluded the tax return for the indemnity company as distinguished from the insurance company? A. No. [262]

Q. And that is a tax of what amount?

A. \$138.37.

Q. Deduct that from the total there.

A. Yes, sir.

Q. And what do you have? A. \$2,782.36.

Q. Is that figure the twenty-eight hundred dollars that you referred to in my direct examination?

A. I believe I referred to it as twenty-eight hundred dollars.

Mr. Horowitz: That is all.

Mr. Whitla: That is all.

(Witness excused.)

G. M. JORDAN

a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Horowitz:

Q. Where do you reside, Mr. Jordan?

A. Spokane, Washington.

Q. What is your age? A. Thirty-six.

Q. How long have you resided in Spokane?

A. About eight years. [263]

(Testimony of G. M. Jordan.)

Q. Are you connected with the Travelers companies?

A. I am employed,—an employee of the Claims Department.

Q. The Casualty Department?

A. The entire organization. It includes the casualty.

Q. You are stationed where?

A. Spokane.

Q. Were you an employee of the Travelers Companies during the construction of the Naval Station at Farragut?

A. Yes, sir.

Q. What was the nature of that work?

A. I was serving the insurance claims and also supervising some people we had working on the project.

Q. Where were you stationed at that time?

A. My office was at Spokane, but certain work was at the project. We had an office at the project, too.

Q. Was the servicing of the claims,—were they claims arising under these policies we are discussing here?

A. Yes, sir; that is right.

Q. Who did you have assisting you in those claims?

A. We had two men, Paul Shedler and George Sonickson, and the clerical staff that was necessary.

Q. What were the functions of these men?

A. Each of these men were resident investigators at [264] the project itself. They lived at the project, or nearby. The purpose of their work was

(Testimony of G. M. Jordan.)

to investigate claims that did arise following injuries on the job, or to assist workmen in preparing reports and forms required by the Industrial Accident Board, and to cooperate with the hospital on the job that was maintained by the contractor and the insurance company, and to obtain medical reports, and to assist in arranging for medical care for men outside of the job. Some injuries were so severe that they had to have care either in Coeur d'Alene or Spokane; and also in preparing papers for the workmen's compensation claims.

Q. What period of time was covered by the service you were rendering with the assistance of these men?

A. My first knowledge of this project was received on April 30th, 1942. That was the first day that I knew of this. My original instructions came on that day, and we are still serving it today.

Q. During the time April 30th, 1942, when you and your associates were engaged in servicing claims, did Mr. Ware assist you in any way?

A. No, sir.

Q. Did he have any functions in connection with your servicing?

A. Not to my knowledge. [265]

Q. In the event that a claim occurred that required attention, or the handling of it by yourself and associates, who would carry the servicing from there on out?

A. I can answer that by explaining it. At one time there was better than twenty-five thousand

(Testimony of G. M. Jordan.)

coming from all over the United States, and they started to dissipate all over the United States because of injury, and it was necessary to service their claims, and we referred the claim to the nearest office to their home. We just followed the men.

Q. And if the men lived in the vicinity of the work?

Mr. Whitla: We object to that, as it is immaterial.

The Court: I don't know that it can be harmful to you. He may answer.

A. If I understand the question, if the men lived in this vicinity and went to other states the matter would be referred to other states.

Q. Would you like to give a specific example to Clarify it?

The Court: I think the matter is very clear to the Court.

Q. Who would look after the claims if they reached the state of contest?

A. By that you mean if there was a hearing before the Industrial Accident Board?

Q. Yes. [266]

A. The firm of Whitla & Knudsen.

Q. And they represented whom?

A. The Travelers Insurance Company.

Q. Was Mr. Ware asked to do anything with them? A. I don't understand.

Q. Did Mr. Ware have anything to do with looking after these contests handled by the attorneys?

(Testimony of G. M. Jordan.)

A. I don't know.

Q. Did you have anything to do with asking Mr. Ware for any service in connection with handling of local claims? A. I never knew Mr. Ware.

Q. Do you know about how many cases you had to send out,— we will say, country-wide?

A. I would say a hundred.

Q. And in what area, generally?

A. All over the United States. I know there was one in Florida, there was some in the Dakotas, some in California, some in the east.

Q. Did Mr. Ware have anything to do with servicing these claims? A. No, sir; he did not.

Q. In connection with handling the claims on the job, did you have contact with the representative,—with the insurance adviser, or representative, or his representative? [267] A. Yes, sir.

Q. Who was he?

A. Mr. G. T. Norton.

Q. He was regularly employed by the Butler Company?

A. You mean who employed the insurance adviser? When he was first seen by me I asked what his title was and he explained that he was——

Mr. Whitla (Interposing): Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Horowitz: That is all.

Cross-Examination

By Mr. Whitla:

Q. You never saw Mr. Ware? A. No, sir.

(Testimony of G. M. Jordan.)

Q. He never refused anything that he was requested? A. No, sir; I never saw him.

Q. You,—we were employed in three very small contested matters, and they were settled by the decision here in Coeur d'Alene?

A. You were representing them in three cases that were contested. They were normal cases, usual cases, before the Board.

Q. To show the extent of them, the fee we charged was [268] twenty-five dollars,—or fifty dollars for the three? A. I don't remember that.

Q. We furnished you with the bills?

A. Yes, sir.

Q. And that was about the sum of our employment? A. Yes, sir; I think so.

Q. You in cooperation with Butler Construction Company kept a hospital on the ground?

A. Yes, sir.

Q. And you kept Mr. Sonickson and Mr. Shedler, that is, they stayed on the ground all of the time?

A. These employees maintained an office.

Q. You kept a clerical force on the ground?

A. Our clerical force that handled the major affairs was in the claims office in Spokane. However, we had one at the process office that was furnished there.

Q. And you, in connection with the Butler Construction Company, hired a couple of doctors?

A. Three of them.

(Testimony of G. M. Jordan.)

Q. That was a joint operation between you and the Butler Construction Company?

A. Yes, sir.

Mr. Horowitz: I offer Defendants' Exhibit No. 29 in evidence, which is a certificate of the Director of Insurance. [269]

(Whereupon document referred to was marked Defendant's exhibit 29 for purposes of identification.)

The Court: Is there any objection to this?

Mr. Whitla: No, we admit that they were authorized to do business in Idaho.

The Court: It may be admitted.

(Whereupon Defendant's exhibit 29 for identification, was admitted in evidence.)

Mr. Whitla: That is all.

Mr. Horowitz: At this time I offer a certified copy of articles of incorporation of the Idaho Compensation Company certified to by the Secretary of State, being Exhibit No. 30. The purpose of this is on the Constitutional question. We want to show that there is discrimination against a foreign company. We want to show that there is a corporation in Idaho doing this business.

(Whereupon Defendant's exhibit 30, being document referred to, was marked for identification.)

Mr. Whitla: We object to it as incompetent, irrelevant and immaterial.

The Court: The Ninth Circuit Court of Ap-

peals reversed the decision of this Court on that matter. I was of the opinion that this was repugnant to the Constitution on two grounds, but the higher Court felt that I was in error in so holding, and there was no further appeal from that Court on that question, and of course that is the law now, so far as this Court is concerned. I don't feel I have any right to pass on it. If I were to re-express my opinion, as I did before, in contradiction to the higher Court, this Court would be subjected to severe criticism. However, I will admit this into the record subject to a motion to strike. However, I would still leave the exhibit in the record, but would grant the motion to strike.

Mr. Horowitz: I do not want to do anything in the trial of this case that will try the patience of your Honor, as I think your Honor has observed from my demeanor here, but we still think this question is in the case. Your Honor may feel presently that you are foreclosed from doing anything about it, but we are going to take this position in dealing with this constitutional question. We believe that the case was sent back to determine the local law. When the Circuit Court passed upon this case it passed on it without regard to what the local law meant. If it is sent back to determine what the law is before the constitutional question is decided, then we would like an opportunity to argue that question. I don't think the Circuit Court of Appeals passed upon the constitutional question, or they passed on it before being advised what the law is, that is the local law. I would like an opportu-

nity to present this matter as to the meaning of the local law. [271]

The Court: I am sure that the Circuit Court has said that the statute was clearly within the power of the state to adopt, and I will follow the same procedure. However, I will admit this, and if counsel will make a motion to strike, I will take the motion under advisement.

(Whereupon Defendant's Exhibit 30 for identification was admitted in evidence.)

Mr. Whitla: At this time, having admitted Defendants' Exhibit No. 30, the Articles of Incorporation of the Idaho Compensation Company, comes now the plaintiff and moves that the said exhibit No. 30 be stricken from the record as being incompetent, irrelevant and immaterial for any purpose whatever, particularly for the reason that this matter was heretofore appealed to the Circuit Court, and they ruled directly upon the constitutionality of the statute and that has become the law of the case under which all further proceedings in this case shall be heard and determined.

The Court: I agree with you at this time, but I will take the motion under advisement at the request of counsel for the defendants.

Mr. Horowitz: That is all. I wonder if your Honor intended to recess shortly?

Mr. Whitla: We have one witness here that is hard for us to hold any longer, and I am sure it will take [272] a very short time. If it is agreeable, I will call her?

Mr. Horowitz: That is agreeable with us.

EVELYN THOMAS MICHAELSON

called as a witness for the plaintiff in rebuttal, having been first duly sworn, testified as follows:

Rebuttal

(Direct)

By Mr. Whitla:

Q. Where do you reside? A. Spokane.

Q. What connection did you have with Eugene H. Ware? A. I was employed by him.

Q. How long?

A. From December 28th, 1938?

Q. Until when—you are the Miss Thomas that signed the letters for E. H. Ware Company in evidence here as Defendants' Exhibits 20 and 21, are you? A. Yes, sir.

Q. Now, you are familiar with the fact that the policies—of the policies coming to the office of Mr. E. H. Ware to be countersigned? A. Yes, sir.

Q. Who got them from the mail?

A. I opened the mail.

Q. Did you read the main policies at the time, or before it [273] was countersigned by Mr. Ware?

A. Yes; I did.

Q. I hand you now this policy marked Plaintiff's Exhibit 1, and I will ask you if at the time this policy came in you read it for the purpose of seeing what endorsements were attached to it at that time? A. Yes, sir.

Q. Do you remember the endorsements as they were specified in the top of the policy?

A. Yes.

(Testimony of Evelyn Thomas Michaelson.)

Q. Were there others than those specified on the face of the policy? A. No; there were not.

Q. When did you hear of the proposition of the War Projects Rating Plan?

A. After the case was started, we received a letter from the company calling attention to the fact that——

Q. (Interposing): The question was, when did you hear of the proposition? That was through a letter from the company? A. Yes, sir.

Q. Calling your attention to the War Projects Rating endorsement 3016, was that matter on the policy at the time it was submitted to Mr. Ware for countersigning? A. No, sir. [274]

Q. Accompanying these policies was there any bond? A. A bond prior to the policies.

Q. What did you do with the bond?

A. It was signed by Mr. Ware and forwarded to the company.

Q. What was done with the policies immediately after they were signed?

A. Forwarded to the company.

Q. Was an envelope supplied for sending them to the company? A. Yes, sir.

Mr. Whitla: That is all.

Cross-Examination

By Mr. Horowitz:

Q. Can you remember from memory what endorsements were on the policies, what were the names of the endorsements on the policies?

A. I don't recall the names of them.

(Testimony of Evelyn Thomas Michaelson.)

Q. What was the subject matter of any of the endorsements on the policies?

A. I cannot recall.

Q. It is pretty hard to remember documents that you looked at a number of years ago as to the endorsements that came on policies, isn't it?

A. I looked over the policy with the idea that we were out [275] trying to solicit business.

Mr. Horowitz: I move that be stricken as not responsive. My question is:

Q. Did you remember? Now, you don't claim that you remember the nature of the endorsements that were attached to this policy?

A. That one particular endorsement I recall because it was something new.

Q. What endorsement?

A. The War Rating endorsement. I never heard of it.

Q. You noticed it at that time?

A. Yes, sir.

Mr. Horowitz: That is all.

Redirect Examination

By Mr. Whitla:

Q. Did you check the policy to see what it covered? A. Yes.

Q. Why?

A. Because Mr. Ware was going out to the base to contact someone in regard to compensation insurance.

Q. Had he done that prior to the time the policy came in? A. Yes, sir.

(Testimony of Evelyn Thomas Michaelson.)

Q. Then because of the fact that he attempted to solicit [276] business——

Mr. Horowitz: There is no claim for services. There is no claim in any of the pleadings. Surely at this time we are not going to change the theory of this case. I submit that it is incompetent, irrelevant and immaterial, and it is improper rebuttal.

The Court: Under the statute, there are two provisions: One is the provision that where an agent gets the insurance he is entitled to the full commission; another is that provision where the insurance is obtained by a license broker, that he shall receive five per cent. Now, either of these provisions may apply here, if the Court was to hold that there was sufficient evidence.

Mr. Horowitz: At the time this policy was written, your Honor, there was no provision for a broker to be licensed under the laws of the State of Idaho. In 1943 a statute was passed which created the licensed brokerage law, but there was no provision under the Idaho law other than fire insurance brokers.

Q. (Mr. Whitla, continuing): What was the reason you had for checking the policy?

A. For the purpose of soliciting business. Mr. Ware had gone out to solicit business, but he was unable to contact the person in charge. [277]

Q. Then after that what did you do with reference to checking this policy when it came in?

Mr. Horowitz: That has been answered.

The Court: She may answer again.

(Testimony of Evelyn Thomas Michaelson.)

Q. Did I understand that the War Projects Rating endorsement was on it?

A. It was not on it.

Mr. Whitla: That is all.

Recross-Examination

By Mr. Horowitz:

Q. You, as I understand it, were working for Mr. Ware for a number of years, from 1938 on?

A. For five and a half years.

Q. What did you do the day before this policy came in?

Mr. Whitla: Now, we object to this as incompetent, irrelevant and immaterial.

The Court: Sustained. That is impossible to be answered.

Mr. Horowitz: That is exactly the point. It bears on the question of credibility.

The Court: I don't think that is a good question, even as to the credibility. The objection is sustained.

Q. (Mr. Horowitz, continuing): By the way, do you recall whether there was an Idaho statutory endorsement on the policy [278] at the time you inspected it? A. I don't recall.

Q. Do you recall whether there was a provision in the policy calling for the Idaho statutory endorsement? A. No, I don't.

Q. Do you know what the Idaho statutory endorsement is? A. No, not now, I don't.

Q. Do you now recall any particular endorsement on the policy?

(Testimony of Evelyn Thomas Michaelson.)

A. No, but there would be the one on occupational diseases.

Q. Do you think of any others?

A. There were some others attached, but I don't know what they were.

Q. When this was countersigned there were various endorsements attached, and you cannot recall what these were? A. Yes, sir.

The Court: Can you tell by looking at the policy? A. Yes, I think so.

Redirect Examination

By Mr. Whitla:

Q. I think you took the number of the policy and checked to see if that number was there?

A. Yes, sir; that is right. [279]

Mr. Whitla: That is all.

Mr. Horowitz: That is all.

The Court: We will recess at this time until ten o'clock tomorrow morning.

May 2nd, 1947, 10:00 A. M.

GEORGE E. PETERSON

a witness on behalf of Defendants, recalled for further cross-examination, having been previously sworn, testified as follows:

Further Cross-Examination

By Mr. Whitla:

Q. Mr. Peterson, taking up some of these companies referred to by you, the Lumbermen's Mutual

(Testimony of George E. Peterson.)

Casualty Insurance Company, that company writes through both agencies and by direct writing, does it not?

Mr. Hawkins: For the purpose of the record, I would like to say that we didn't have access to Best's Guide, and we tried to get the information from the book we had. I hope that you can shorten this up. It seems to me it is very immaterial.

Mr. Whitla: I think we can.

A. It appears from this record that they do write some [280] directly, and pay some commissions, a very small rate of commission shown overall in connection with the Lumbermen's Mutual.

The Court: What is that commission?

A. 2.7 per cent.

Q. (Mr. Whitla, continuing) Best shows here both agency and direct writing are involved and used by that company?

A. It shows a commission of 2.7 per cent, \$7,020.00.

Q. That would indicate that a good part of the business is done direct?

A. A very substantial part.

Q. I believe you mentioned the American Liability Company. That writes on a commission basis, entirely, does it not?

A. What was that question?

Q. The American Liability—the American Mutual Liability writes on a commission basis?

A. It does not.

Q. I call your attention to Best at page 450

(Testimony of George E. Peterson.)

showing this: In writing this insurance, commissions of \$274,986.00 or eight per cent?

Mr. Horowitz: That is not eight per cent. That is eight-tenths of one per cent.

A. Eight-tenths of one per cent. I concluded that the [281] major portion of the business was not on a commission basis.

Q. And the Employers Mutual Casualty, what business—or, rather, what basis does that company write its business on?

A. Is that the Mutual Liability Insurance?

Q. There are two of these Employers Mutual. There is the Employers Mutual of Warsaw.

A. That is the large company.

Q. That writes both ways?

Mr. Horowitz: What company are you talking about now?

Q. The Mutual Company of Warsaw—the Employers Mutual of Warsaw.

A. They apparently write some business on a commission basis but the bulk of the business must be on direct solicitation, because the commission of one and seven-tenths per cent of the total writings, which are some twenty-nine million.

Q. You spoke of the Lumbermen's Mutual Casualty Company, one of the companies that was on the committee with you?

Mr. Horowitz: Isn't that the Liberty Company?

Mr. Whitla: I asked for the Lumbermen's.

A. The Lumbermen's Mutual of Chicago?

Q. No, I believe you gave the Lumbermen's Mutual Casualty [282] Company of New York.

(Testimony of George E. Peterson.)

A. They write, apparently, on both phases, writing the bulk of the business direct since the premium—and by the way that is the Lumber Mutual Casualty Company of New York. The premiums are two million five hundred and ninety-six thousand, and the commission amounts to only 2.7 per cent.

Q. Now, I believe you also mentioned the Employers Mutual Casualty?

A. That is the Warsaw Company?

Q. No.

A. That is from Des Moines, Iowa.

Q. Yes; I think it is.

A. They apparently write the bulk of their business, if not all of it, on a commission basis.

Q. The commission rate is 18.9 per cent?

A. That is correct, but it is a relatively small company, writing six million total premium annually.

Q. These companies that write on another basis keep salaried agents instead of commission agents?

A. I never heard them referred to as that; they are called salaried employees.

Q. I believe you spoke of the Hardware Mutual Casualty Company? A. Yes. [283]

Q. I call your attention to Best's at page 530, the Hardware Mutual Casualty Company also has a large force of employees whom they call safety engineers and claim representatives?

A. Yes, sir; it indicates that they have some six hundred people engaged in so-called servicing and

(Testimony of George E. Peterson.)

solicitation. In my book it shows they pay no commission whatever.

Q. Do you know whether these companies have agents in Idaho? A. I would not know that.

Q. Do you know whether—strike that, please.

A. (Interposing): I do know that the Employers Mutual of Des Moines wrote nine thousand dollars of business in Idaho out of \$6,647,000.00 in premiums.

Q. The Hardware Mutual Company has agents in Idaho? A. I don't know about that.

Mr. Whitla: That is all.

Redirect Examination

By Mr. Horowitz:

Q. That list that counsel gave you, did it include the Liberty Mutual?

Mr. Whitla: The Liberty Mutual is shown in Best's as being large and paying heavy salaries, does it not?

A. I don't know what salaries they pay. [284]

Mr. Whitla: Doesn't it show in Best's as to what kind of salaries they have for the Home Office?

A. You have Best's. I didn't have it. I cannot tell you.

Mr. Whitla: Calling attention to Best's, on page 570 under their "Underwriting Expenses," "Br. Office," means branch office? A. Yes.

Mr. Whitla: And branch office and agents salaries, \$3,863,221.00, or five and one-half per cent?

Mr. Horowitz: That is five and one-tenth per cent.

(Testimony of George E. Peterson.)

A. In the Spectator chart there is no agent commission recognized.

Mr. Whitla: What about the agent's salaries?

A. I think it should be like the others.

Mr. Whitla: They pay inspectors, too, do they not? A. Yes.

Mr. Horowitz: And what percentage does that show? A. One and seven-tenths.

Mr. Whitla: Does it indicate they have agents working on salaries that do this work amounting to a considerable sum of money? [285]

A. They have salaried employees, according to the Spectator chart, but there are no commissions.

Mr. Whitla: Those that no not have commissions have salaried agents? A. Yes, sir.

Redirect Examination

By Mr. Horowitz:

Q. The commission companies have salaried employees, engineering service? A. Yes, sir.

Q. Is engineering service comparable to paying persons for producing business? Is it comparable to commissions?

A. I don't see the relationship, personally.

Q. According to the information you have from Best, or the Spectator, they are both well recognized? A. We use it.

Q. According to the Spectator does the Liberty pay any commission?

A. No, sir; they do not.

Q. How much premium income does the Liberty Mutual have?

(Testimony of George E. Peterson.)

A. It is the largest casualty company in the United States, if not in the world, that is, the largest Mutual casualty. It has a total premium of \$75,888,423.00.

Q. What is the area of operation? [286]

A. On a national basis.

Q. Did the Liberty Mutual write any business in Idaho, according to the Spectator?

A. They had \$2,000.00 in business in Idaho in 1945, according to the Spectator.

Q. When you took Mr. Whitla's list, how many companies did he have on that list?

A. One hundred and one.

Q. How many were you able to find in the Spectator?

A. I have the totals on sixty-eight of them.

Q. Included in that list were there any companies who write other than casualty business?

A. Yes sir; quite a few. I should judge by their names some of them were not in the casualty business at all.

Q. Will you give us one illustration?

A. Well, the largest mutual life insurance company in the world, the Metropolitan Life.

Q. Excluding life insurance companies, and confining it to the sixty-eight companies that he gave you, what was the average rate of commission?

A. The average was seven and five-tenths of the sixty-eight companies, and I made a further calculation and took out two companies not in the cas-

(Testimony of George E. Peterson.)

ualty field, and I reduced that seven and five-tenths per cents to seven and one-tenth [287] average.

Q. According to the information in the Spectator chart dealing with the one hundred companies involving a total premium of \$385,544,170.00, what was the average rate of commission?

A. The average rate for the hundred was 6.9 per cent.

Q. Did you make any calculation to determine whether the mutual companies wrote any business on a non-commission basis?

A. They must, in order to show that average, over all.

Q. How does that average compare with the stock company commissions during the same period of time?

A. The Spectator chart has a list of one hundred and ninety stock companies with premiums of \$1,194,108,319.00 against which is shown an average commission payable, and paid, of 18.1 per cent.

Q. Will you please tell the Court whether the companies embraced in the one hundred mutual and one hundred ninety stock companies refer to the entire United States? A. Yes, sir.

Q. Will you tell us if the Spectator that you used show the amount of compensation business written by the Idaho Compensation Company in the state of Idaho for any of the years that you checked?

A. I cannot find it in that book, but I found it in an edition of Best that I have, with the key rating, and it shows some of the totals. The total

(Testimony of George E. Peterson.)

premiums of the company,—and I found the Idaho Compensation.

Q. What did you find?

A. In 1942, 1943, 1944 and 1945.

Q. What is the total premiums listed under the premiums written?

A. \$724,000 in 1945; net premiums around \$750,00 in that year.

Q. Does that show, or do you have the data there, so that you can determine how much of the compensation business written by the Idaho Compensation is as compared with the total written in this state?

A. Yes, sir; we do have some information.

Mr. Whitla: This goes under my same objection.

The Court: That is understood.

A. The Idaho Compensation writes about ten times as much as any other single company doing business in Idaho.

Mr. Horowitz: That is all.

Recross Examination

By Mr. Whitla:

Q. Do you notice the commission it pays?

A. It doesn't show it in this little book.

Q. It is just a new company that started a few years ago [289] and went up in about seven years from nothing to \$700,000 in 1945?

A. Yes, sir.

The Court: And there is no showing of the commission paid by them? A. No.

Mr. Whitla: I have a witness here to show that.

(Testimony of George E. Peterson.)

Mr. Horowitz: That is all.

Mr. Whitla: That is all.

Mr. Horowitz: So that the record may be clear that all of the exhibits we have offered have been admitted, I want to reoffer Defendants' Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23-A, 24, and the Letter "C" if that was the letter given it by the Clerk of Defendants' Exhibit No. 8, Defendants' Exhibits 28, 29 and 30, and if I have omitted any, I would like to include them in this offer, any that were identified.

The Clerk: Was Defendants' Exhibit 17 offered?

Mr. Horowitz: It was offered.

The Court: They may be admitted subject to the objections.

Mr. Horowitz: Do I understand they may be admitted over counsel's objection?

The Court: They may be admitted subject to any [290] objection heretofore made; at the time they were offered any objection made then is still in the record.

Mr. Horowitz: Very well. And we rest.

J. G. ADAMS

a witness on behalf of the plaintiff in rebuttal,
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Whitla:

Q. Where do you reside?

A. Coeur d'Alene, Idaho.

(Testimony of J. G. Adams.)

Q. How long have you resided here?

A. Three years.

Q. What is your occupation, Mr. Adams?

A. Insurance and real estate.

Q. How long have you been in the insurance business? A. For thirty years.

Q. In what capacity have you acted?

A. As local agent, in the company's Home Office, and employed as branch manager.

Q. Of what companies?

A. General Insurance of America, General Casualty of America and the First National Insurance Company of America.

Q. What branch office were you manager of?

A. Boise, and Spokane.

Q. Have you been engaged, since you have been in [291] Coeur d'Alene, in running a general Insurance Agency? A. Yes, sir.

Q. Did you—strike that—during your time as an Insurance man are you familiar with a concern known as the Hardware Mutual Casualty Company?

A. Yes, sir.

Q. Did you know anything about their agency arrangement or how they handled their agency?

A. I was Branch Manager of the Spokane Office of the General Casualty Company, I had occasion to hire employees for our office that had previously been——

Mr. Horowitz: I don't think that is responsive.

Q. If you know about the arrangement.

A. Their agents are employees of the Company,

(Testimony of J. G. Adams.)

they work on a commission—a combined commission and salary basis; they pay their own expenses of operation and the Company pays them on a scale on what they produce in premiums for the company.

Q. Do you know generally whether Mutual Companies have agencies, that is, whether they have agents employed on a commission basis or not?

A. Yes, sir.

Q. Do they? A. They do.

Q. Is that unusual or is it the ordinary thing with Mutual Companies? [292]

A. That is the usual thing in this territory.

Q. Several of them operate in this territory?

A. Yes, sir.

Q. Is that the way they operate?

A. Yes, sir.

Q. Now, do you know what general service is performed by the local agent both to the assured and the Insurance Company, what that consists of?

Mr. Horowitz: Object to that as incompetent, irrelevant and immaterial and improper rebuttal.

Mr. Whitla: I expect to show this advisory service is not as much as the local agent performs in the way of service. This is only one way to replace the local agent by another employee.

Mr. Horowitz: I object as incompetent, irrelevant and immaterial.

The Court: I agree with counsel, however, I am going to permit him to answer because—well, he may answer.

Mr. Horowitz: May my objection go to this line of testimony as being immaterial.

(Testimony of J. G. Adams.)

The Court: Yes, and I might say I feel that it is immaterial.

Mr. Whitla: If your Honor thinks it is immaterial I will not pursue it further. That is all. You may examine.

Mr. Hawkins: No questions. [293]

OSCAR NELSON

being recalled as a witness on behalf of the plaintiff, testified in rebuttal as follows:

Direct Examination

By Mr. Whitla:

Q. You have been sworn? A. Yes, sir.

Q. As an insurance agent do you know whether there are mutual companies operating in this vicinity? A. Yes, sir.

Q. Do you know how they pay their agents, whether it is a commission basis or otherwise?

A. Yes, sir.

Q. How do they pay them?

A. On a commission basis principally.

Q. Is that a general thing in connection with the Mutuals operating in this vicinity?

A. Yes, sir.

Q. What has been your experience as far as qualifying yourself to act as an insurance man?

Mr. Horowitz: I don't see the materiality of this.

Q. State your qualifications?

(Testimony of Oscar Nelson.)

A. Besides taking care of my office since 1924 I have taken a correspondence course in Insurance and been back to Hartford in connection with the sales school.

Q. For what company? [294]

A. The Aetna Casualty and Surety Company.

Q. You have been agent for how long for that Company?

A. Twenty-three years and still am. I am past president of the Idaho Association of Insurance Agents. I am a member of the executive committee of the Idaho Association and I have represented the association in San Francisco meetings and with the contact committee with what is known as the Idaho Advisory Committee, it is a matter of getting the representatives and agents meeting together—now, those are some of my qualifications.

Q. In addition to that and in your work or business and with these committees to you have contact with Mutual Company operating in this territory? And do you know their practice relative to paying their agents?

A. Yes, sir. I might also say that I was called to Boise to consult at the time they drew this new Insurance law. I was there three different times.

Q. That was last winter? A. Yes, sir.

Q. Now, Mr. Nelson, have you any connection with the Idaho Compensation Company?

A. Yes, sir.

Q. You say you are connected with that company? A. Yes, sir. [295]

Q. What part of the business did you handle?

(Testimony of Oscar Nelson.)

A. I am general agent. My territory is the five northern counties.

Q. As general agent, what commission do they pay you?

Mr. Horowitz: I make the same objection that I made when the matter was first mentioned, that it is immaterial. The evidence shows that the matter of commission is a matter of contract between the agent and the insurance company.

The Court: That is true, except for the evidence placed in the record by the defendants, and in view of the testimony, he may answer.

Mr. Whitla: It is subject to my motion to strike, the other offer, and if it goes out, then of course my testimony will also go.

The Court: He may answer.

A. Seventeen and one-half per cent.

Q. (Mr. Whitla, continuing): Mr. Nelson, something was said here about a man by the name of Norton that worked for the Butler Company as an insurance man?

A. Yes; I have met him.

Q. Who referred you to him?

A. Mr. Butler.

Q. Did he tell you in whose employ he was, and what he did? [296]

Mr. Horowitz: That is objected to as hearsay.

Mr. Whitla: He is the insured in this matter.

The Court: That objection will be sustained.

Q. Mr. Nelson, does the Idaho Bureau of Insurance put out a report yearly as to the companies in this state, the amount of business, and the number of agents they have, and things of that kind?

(Testimony of Oscar Nelson.)

A. They do; yes, sir.

Mr. Horowitz: This book that was handed to me, Mr. Whitla, do I understand you are restricting your offer to certain pages?

Mr. Whitla: Yes; I will have him identify the book.

Q. Mr. Nelson, I hand you what has been marked as Plaintiff's Exhibit No. 31, is that a copy of the report of the Bureau of Insurance of the State of Idaho for the year 1943, that is ending June 30th, 1943? A. Yes, sir.

Q. And that is for the fiscal year from June, 1942, to June, 1943? Is the report for two years?

A. No; for one year.

Mr. Horowitz: It is for the year ending June, 1943? A. Yes. [297]

Mr. Whitla: I ask to have this page, which is page "C" of this book—I ask to have it marked Exhibit "A", it shows the business transacted in Idaho by the miscellaneous companies during the year ending December 31st, 1942, and then page ten of the book showing the companies licensed in Idaho, and the number of agents they have, and other data, introduced to show the number of agents. I would like those two pages marked 31-A and 31-B. They are a part of Exhibit No. 31.

(Whereupon documents referred to were marked Plaintiff's Exhibits 31, 31-A and 31-B for identification.)

Mr. Whitla: And I now offer this in evidence.

Mr. Horowitz: We object to 31-A on the ground

(Testimony of Oscar Nelson.)

it is incompetent, irrelevant and immaterial. It purports to be a compilation of data showing the names of the companies engaged in health and accident, liability, workmen's compensation, fidelity, surety, plate glass, burglary and theft, property and auto damage and collision, property damages and collision other than auto, and miscellaneous. It shows under various headings the premiums retained or written, losses paid on the various types of insurance. It is utterly immaterial to any issue in this case. I don't see the purpose of having it offered, and I don't see the materiality. [298]

Mr. Whitla: It shows the names of the companies doing business in this state, how much business they are doing, and then back here (indicating) it shows the agents, and the number of agents, and it shows the companies who did not employ agents.

Mr. Horowitz: It is not a fair summary of any evidence.

The Court: It may be admitted so far as it has any information in it which goes to the companies that were mentioned by the testimony on the witness stand here on behalf of the defendants. The Court will only consider it to that extent, after examining the transcript.

Mr. Horowitz: As to the offer of 31-B, that purports to show the companies licensed, and the number of agents, the three dollar certificate of authority of agent, the filing fees for the year, and the premium on taxes, and the totals. That contains a number of companies that have not been men-

(Testimony of Oscar Nelson.)

tioned. I don't see the materiality of any of that information.

Mr. Whitla: It is material only in that they said that mutual companies don't employ agents.

Mr. Horowitz: I submit the evidence does not show it as Mr. Whitla has stated.

The Court: I think we have taken up a lot of time with immaterial matters——

Mr. Whitla (interposing): This is the last question.

The Court: There are only two matters here. The contract between Ware and the defendant; the other is the statute of Idaho. All of these other outside matters, as I have said repeatedly throughout this trial, I don't think they are material at all, any of those questions, or any of those matters. A great many times these matters have gone into the record without objection; other times, I have admitted them subject to the objection of counsel, although I thought they were immaterial at the time. Now, after admitting a great many matters that I felt were immaterial at the time, I don't like to stop now, but we will have to stop this case at some time or other. I am going to admit this simply because counsel says this is the last question.

(Whereupon Plaintiff's Exhibits 31, 31-A and 31-B for identification were admitted in evidence.)

Mr. Whitla: That is all.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Nelson, the agency commission you spoke

(Testimony of Oscar Nelson.)

of as seventeen and one-half per cent, is that the general agent's commission? [300]

A. That is right.

Q. And out of that you pay to the producing agent for procuring the business?

A. Yes, sir.

Q. What do you pay them?

A. Ten per cent.

Q. Retaining seven and one-half per cent for yourself? A. That is right.

Mr. Hawkins: That is all.

Mr. Whitla: That is all; and the plaintiff rests.

Mr. Horowitz: We have no sur-rebuttal.

The Court: Then do I understand the defendants rest?

Mr. Horowitz: The defendants rest; yes, sir.

The Court: Now, we will wait for the transcript in this case, and after you have received the transcript, I will notify you when the Court will hear oral arguments; I am satisfied that after the oral arguments the Court will also want you to prepare and file briefs, and submit your authorities to the Court. I think, without doubt, the Reporter will have this transcript for you by the twelfth of this month, and then we can set the oral argument for the 28th, and I will, as soon as the transcript is prepared, have the exhibits all here with the Clerk in Coeur d'Alene, with authorization to [301] the Clerk that counsel may take to their office the exhibits and return them to the clerk when they are through with them. They will be available to attorneys for both parties. So that you will have your

briefs filed in an orderly fashion I will say now that of course I will not expect you to have your briefs prepared at the time of oral arguments, but after the oral arguments, I will give the plaintiff a certain length of time, and then defendants will have a certain time in which to file a reply, and the plaintiff may have additional time if it is necessary to file a reply brief.

Now, is there anything else that is not understood?

Mr. Hawkins: Do I understand that counsel will be notified as to the time for the oral arguments? Do I understand that the Clerk will advise counsel as to the date for oral arguments?

The Court: The date is now set for May 28th, and if there is any change in that date counsel will be notified by the Clerk, otherwise oral arguments will be heard at Coeur d'Alene on May 28th.

(Which was all of the evidence and proceedings adduced on said hearing.) [302]

REPORTER'S CERTIFICATE

United States of America,
State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, the duly appointed, qualified and acting Official Reporter of the District Court of the United States, in and for the District of Idaho, Do Hereby Certify That I reported in shorthand the evidence and proceedings in the within and foregoing matter, and thereafter caused said shorthand notes to be transcribed into longhand typewriting, and that the within and foregoing con-

stitutes and is a full, true and correct copy of the transcript of said evidence and proceedings, consisting of two hundred and eight pages.

In Witness Whereof, I have hereunto set my hand this the day of May, A.D. 1947.

/s/ G. C. VAUGHAN,
Official Reporter.

Filed Feb. 13, 1948. [303]

[Title of District Court and Cause.]

**DESIGNATION OF CONTENTS OF RECORDS,
AND STATEMENT OF POINTS UPON
WHICH APPELLANTS WILL RELY**

The appellant designates parts of the record which she thinks necessary for the cause of the appeal herein, to be printed as follows:

1. Complaint.
2. Answer.
3. Reply.
4. Motion for trial.
5. Application to amend answer and trial amendment of answer.
6. Orders for inspection of record, dated and filed April 3, 1946.
7. Stipulation.
8. Opinion.
9. Findings of fact, and conclusions of law.
10. Judgment.
11. Notice of appeal.
12. Proof of service notice of appeal.
13. Statement of the evidence to be prepared and submitted. [304]

14. Copies of this designation and statement.

The appellant submits herewith the following concise statements of points on which she expects to rely on the appeal:

1. The court erred in making and entering Finding of Fact No. 6, for the reason that by said Finding of Fact the court finds that the U. S. Navy, under the jurisdiction of the Bureau of Yards and Docks, required the making of the contract of the character claimed by the defendant as Comprehensive Rating Insurance Rating Plan for National Defense Projects, or designated War Projects Insurance Plan, and that such is not correct, is not sustained by the evidence, and that the record shows said plan was not to be operated in states where it was prohibited by law or was in conflict with the laws of the state, and erred in not finding that the plan was not permissible under the laws of the State of Idaho.

2. The court erred in finding that the policies were placed through the Acme Brokerage Corporation of New York for the reason that the evidence shows that the Acme Brokerage Corporation was acting for the Walter Butler Company as its agent, and its services were being paid for by the U. S. Government, and that it was not acting as a brokerage company in handling said insurance.

3. The court erred in making Finding of Fact No. 8 for the reason that the law of the State of Idaho became a part of the contract made between Eugene H. Ware and the [305] defendants, and that when it submitted the contracts to him for counter-

signing the same constituted the writing of the policies under the laws of the State of Idaho.

4. The Court erred in making Finding of Fact No. 9 for the reasons:

- a. That there was no contract made or entered into, as found in said paragraph;
- b. And that the contract between the parties was the contract which they had made and both signed, and that the alleged contract set forth is but a letter written by the defendant to the said Eugene H. Ware for a small amount of countersigning, and was intended by the defendants to evade the laws of the State of Idaho, and if valid for any purpose, was void as being against the public policy of the laws of the State of Idaho, and cannot be set up by the defendants to evade their written contract and the liability imposed by law;
- c. And that it is shown that immediately upon finding that the defendants claimed the policies in question were being written under said letter the said Eugene H. Ware refused to accept further compensation from them, and was never paid any sum after said policies were written whatsoever, and that no consideration, whatever, was ever paid to the plaintiff for countersigning said policies.

5. The Court erred in making Findings No. 11, for the reason that the said Eugene H. Ware rendered valuable services in having his office and

keeping his office open for the purpose of servicing said policies if called upon by the defendants, and that the finding that no services were required of a countersigning agent is contrary to the fact, and that countersigning agents are subject to be called upon for all services in servicing the policies countersigned by them.

6. The Court erred in making Finding of Fact No. 12 [306] for the reason that "it is immaterial" is not a correct statement of the law and is erroneous.

7. The court erred in making Finding No. 13 for the reason that it is not within the issues of this case, immaterial, and erroneous.

8. The court erred in making Conclusions of Law No. 2 for the reason that the statute does provide that the agents shall receive the full commission and that the full commission, as fixed by the contract and as testified to by witnesses, which testimony was undisputed, is the sum of ten per cent.

9. The court erred as a matter of law in concluding that no provision of said statute applied to the facts in this case so as to permit recovery, and that the provision in the statute providing for the full commission does form a basis for fixing commissions in this case.

10. The court erred in concluding as a matter of law he had been paid Five dollars a month therefore, for the reason that said alleged agreement, if there was any, is void, and that it is not shown that said alleged letter was intended to apply to this case, and that it was not considered by the said Eugene

H. Ware that it did, and that no payment was made after the services were performed, and that said alleged letter, if intended as the defendants contended, is an attempt by the defendants to violate the laws of the State of Idaho and is contrary to the public policy of the State of Idaho.

11. The court erred in entering a judgment in favor of the defendants and against the plaintiff for the reason [307] that the evidence in this case conclusively shows that the said Eugene H. Ware was a duly designated agent of the defendants, and that by his contract he was to be paid Ten per cent commission upon all workman's compensation without regard to the kind or character, and that such was the regular full commission allowable and generally paid to insurance agents in that vicinity, and said contract was in full force and effect at the time of the countersigning of the policies in question, and the law providing for the payment of said full commissions became a part of the contract and the action of the defendant in writing a letter does not permit them to evade the laws of the State of Idaho and that by reason thereof, under the evidence in this case, the plaintiffs were entitled to recover as the facts relative to the amount of premiums collected was stipulated in the case.

Dated this 24th day of January, A.D. 1948.

EZRA R. WHITLA,

E. T. KNUDSON,

Attorneys for Appellant, Residence and P. O. Address: Coeur d'Alene, Idaho.

(Affidavit of Service filed.)

Filed Jan. 27, 1948. [308]

[Title of District Court and Cause.]

REQUEST FOR ADMISSION UNDER RULE 36

Defendants, and each of them, request the plaintiff to make the following admissions for the purpose of this action only (reserving the right to make additional requests hereafter), and subject to all pertinent objections to admissibility which may be interposed at trial:

1. That each of the following documents exhibited with this request is genuine:

Checks signed by the Travelers Insurance Company, in the sum of \$5.00 each, on "The Chase National Bank of The City of New York, Metropolitan Branch," payable to Eugene H. Ware Co. and bearing endorsement of payee, dated and numbered as follows:

10/22/36.....No. X 477258	3/10/38.....No. X 546367
11/20/36.....No. X 478720	4/11/38.....No. X 550759
12/15/36.....No. X 482218	5/10/38.....No. X 555661
1/25/37.....No. X 487868	6/10/38.....No. X 560179
2/15/37.....No. X 492352	7/11/38.....No. X 564446
3/15/37.....No. X 492639	8/10/38.....No. X 569069
4/15/37.....No. X 497038	9/10/38.....No. X 572136
5/15/37.....No. X 502448	10/10/38.....No. X 577317
6/10/37.....No. X 507091	11/10/38.....No. X 582634
7/10/37.....No. X 511360	12/10/38.....No. X 585794
8/10/37.....No. X 515630	1/10/39.....No. X 594951
9/10/37.....No. X 520054	2/10/39.....No. X 598524
10/11/37.....No. X 524413	3/10/39.....No. X 600765
11/10/37.....No. X 524631	4/10/39.....No. X 605283
12/10/37.....No. X 533098	5/10/39.....No. X 609543
1/17/38.....No. X 535341	6/10/39.....No. X 613559
2/21/38.....No. X 542518	7/10/39.....No. X 618660

8/10/39.....	No. X 623434	1/16/41.....	No. X 698701
9/11/39.....	No. X 627228	2/24/41.....	No. X 704409
10/10/39.....	No. X 630877	3/10/41.....	No. X 707697
11/10/39.....	No. X 635742	4/10/41.....	No. X 712315
12/11/39.....	No. X 640702	5/10/41.....	No. X 718237
1/25/40.....	No. X 648508	6/10/41.....	No. X 721355
2/10/40.....	No. X 653388	7/ 7/41.....	No. X 726030
3/11/40.....	No. X 654946	8/ 7/41.....	No. X 730647
4/10/40.....	No. X 658600	9/10/41.....	No. X 735665
5/10/40.....	No. X 663756	10/10/41.....	No. X 739832
6/10/40.....	No. X 668408	11/10/41.....	No. X 744578
7/ 6/40.....	No. X 672542	12/10/41.....	No. X 750788
8/ 7/40.....	No. X 677229	1/10/42.....	No. X 761368
9/ 7/40.....	No. X 680913	2/10/42.....	No. X 769605
10/10/40.....	No. X 686162	3/10/42.....	No. X 771012
11/ 9/40.....	No. X 690685	4/10/42.....	No. X 775370
12/10/40.....	No. X 695307	5/11/42.....	No. X 782899

2. That each of the following statements is true:

(w) That the original letter of October 21, 1936, copy of which is attached as Exhibit 1 to the answer, was received by Eugene H. Ware or Eugene H. Ware doing business as "Eugene H. Ware Company," on or about October 21, 1936, and remained in the possession of the said Eugene H. Ware up to the date of his death.

(x) That the original of the letter referred to in subparagraph (w) is now in the possession of the plaintiff.

Dated this 22nd day of July, 1946.

C. H. POTTS,

Address: Coeur d'Alene, Idaho.

CHARLES HOROWITZ,

Address: 2000 Northern Life

Tower, Seattle 1, Wash.

Of Counsel

PRESTON, THORGRIMSON,

HOROWITZ & TURNER.

(Service Acknowledged.)

Filed July 22, 1946. [310]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO AMEND ANSWER BY WAY OF TRIAL AMENDMENT

The motion of the defendants, pursuant to Rule 15 of the Rules of Civil Procedure, for leave to amend Answer by way of trial amendment without the necessity of serving or filing an amended answer embodying said trial amendment having come on to be heard this day,

It Is Hereby Ordered that the trial amendment to the answer annexed to the motion for leave to amend answer by way of trial amendment as filed in the above-entitled cause be, and the same is hereby, granted and said proposed trial amendment shall be deemed added to the answer of the defendants on file herein without the necessity of serv-

ing or filing an amended answer embodying said amendment.

Done in Open Court this 30th day of April, 1947.

CHASE A. CLARK,

District Judge.

Presented by

CHARLES HOROWITZ,

WM. S. HAWKINS,

Attorneys for Defendants.

Filed April 30, 1947. [311]

[Title of District Court and Cause.]

RESPONDENTS' DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED

The respondents designate additional portions of the record, proceedings and evidence to be included as follows:

1. Request for admission under Rule 36, Paragraph 1, Paragraph 2(w) and 2 (x).
2. Order granting leave to amend answer by way of trial amendment, dated April 30, 1947.

Plaintiff's exhibits as follows:

- | | |
|-----------------|------------------|
| 3. Pl. Ex. 1. | 7. Pl. Ex. 1-d. |
| 4. Pl. Ex. 1-a. | 8. Pl. Ex 4. |
| 5. Pl. Ex. 1-b. | 9. Pl. Ex. 5. |
| 6. Pl. Ex. 1-c. | 10. Pl. Ex. 5-A. |

- | | |
|------------------|------------------------|
| 11. Pl. Ex. 5-B. | 20. Pl. Ex. 5-K. |
| 12. Pl. Ex. 5-C. | 21. Pl. Ex. 5-L. |
| 13. Pl. Ex. 5-D. | 22. Pl. Ex. 5-M. |
| 14. Pl. Ex. 5-E. | 23. Pl. Ex. 5-N. |
| 15. Pl. Ex. 5-F. | 24. Pl. Ex. 5-O. |
| 16. Pl. Ex. 5-G. | 25. Pl. Ex. 5-P. |
| 17. Pl. Ex. 5-H. | 26. Pl. Ex. 5-Q. |
| 18. Pl. Ex. 5-I. | 27. Pl. Ex. 5-R. [312] |
| 19. Pl. Ex. 5-J. | |

Defendants' exhibits as follows:

- | | |
|-------------------|-------------------|
| 28. Df. Ex. 6. | 42. Df. Ex. 18-B. |
| 29. Df. Ex. 7. | 43. Df. Ex. 18-C. |
| 30. Df. Ex. 8. | 44. Df. Ex. 18-D. |
| 31. Df. Ex. 9. | 45. Df. Ex. 18-E. |
| 32. Df. Ex. 10. | 46. Df. Ex. 18-F. |
| 33. Df. Ex. 11. | 47. Df. Ex. 19. |
| 34. Df. Ex. 12. | 48. Df. Ex. 20. |
| 35. Df. Ex. 13. | 49. Df. Ex. 21. |
| 36. Df. Ex. 14. | 50. Df. Ex. 22. |
| 37. Df. Ex. 15. | 51. Df. Ex. 23. |
| 38. Df. Ex. 16. | 52. Df. Ex. 23-A. |
| 39. Df. Ex. 17. | 53. Df. Ex. 24. |
| 40. Df. Ex. 18. | 54. Df. Ex. 29. |
| 41. Df. Ex. 18-A. | 55. Df. Ex. 30. |

56. The transcript of the evidence (corrected) in question and answer form. A copy of the Reporter's Transcript of the testimony is in possession of each party hereto having been ordered pursuant to the request of the trial Court in connection with the argument. Respondents deem it im-

practical to delete from the Reporter's Transcript the testimony with reference to the non-included exhibits, Plaintiff's exhibits 2, 3, 25, 26, 27, 27-a, 31, 31-a, 31-b and defendants' exhibit 28, in view of the complexity and intermingled character of the testimony and, therefore, designate the entire Reporter's Transcript. [313]

57. "Respondents' Designation of Additional Portions of the Record, Proceedings and Evidence to be Included."

Appellant in Item 13 of "Designation of Contents of Records, and Statement of Points upon which Appellant will Rely" refers therein to "Statement of the evidence to be prepared and submitted." No statement of the evidence either in narrative or question and answer form has been submitted or filed to this date. Accordingly, it is impossible to determine to what extent the above items of additional portion of the records, proceedings and evidence will prove to be necessary until after the expiration of the ten-day period contemplated by Rule 75-a of the Rules of Civil Procedure. In view of the generality of the points upon which appellant will rely as stated by appellant, it is believed necessary that the record include all of the items designated by appellant and now designated by these respondents.

If appellant does not do so, respondents will make application to the District Court under Rule 75 (i), to send to the Circuit Court (in lieu of copies) each of the exhibits itemized above in view of their voluminous character and their complexity, and in

further view of the fact that pages of certain exhibits were offered by appellant and other pages of the same exhibit by the respondents.

Dated this 2nd day of February, 1948.

CHARLES HOROWITZ,

Residence and P. O. Address:
Seattle, Washington.

WM. S. HAWKINS,

Residence and P. O. Address:
Coeur d'Alene, Idaho.

(Service acknowledged.)

Filed Feb. 3, 1948. [314]

[Title of District Court and Cause.]

PETITION TO HAVE ORIGINAL EXHIBITS
FURNISHED CIRCUIT COURT OF AP-
PEALS

Now comes the above-named plaintiff and respectfully states and shows to this honorable court that in the appeal herein the plaintiff, as appellant, desires certain exhibits to be furnished to the Circuit Court of Appeals as a part of the record in this case. Said exhibits for the most part consist of photostatic copies of various instruments, including specimen forms which she desired should be sent to the Court in order that they can see the exact manner in which the policies were written in which the records are shown, and such cannot be

shown clearly by any typewritten copy thereof unless it could be done and shown on a form similar to the forms used by the defendant, which is an impractical proposition, and it is necessary, in the appellant's opinion, in order that the case may be properly submitted to the Circuit Court of Appeals that the original exhibits be furnished as a part of the record on appeal.

Wherefore the plaintiff, as appellant in this proceeding, [315] prays that an order may be entered herein directing that in lieu of attempting to make typewritten copies of said exhibits that the original be furnished by the Clerk of this court as a part of the record on appeal.

Dated this 9th day of February, A.D. 1948.

EZRA R. WHITLA,

E. F. KNUDSON,

Attorneys for Petitioner. Residence and P. O. Address, Coeur d'Alene, Idaho.

Filed: Feb. 11, 1948. [316]

[Title of District Court and Cause.]

ORDER

In this matter, upon the petition of the plaintiff, as appellant, that the original photostatic copies of record which are exhibits in this case and which have been required by the appellant on the appeal, be furnished to the Circuit Court of Ap-

peals as a part of said record, and it appearing to the Court that this is a proper case that the original records be furnished so that the Court can see exactly the manner in which the politics were written and the records kept.

It Is Ordered that the original exhibits called for by the appellant be forwarded by the Clerk of this Court to the Circuit Court of Appeals as part of the record on appeal herein.

Dated this 12th day of February, A.D. 1948.

CHASE A. CLARK,
Judge.

Filed February 12, 1948. [317]

[Title of District Court and Cause.]

APELLEES' (RESPONDENTS') SUPPLEMENTAL DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED, AND MOTION

The appellees (respondents) by this supplemental designation designate for inclusion in the record:

1. The entire reporter's transcript of the evidence, in question and answer form; and again request each of Items 1 to 57 originally contained in "Respondents' Designation of Additional Portions of the Record, Proceedings and Evidence to be Included."

This additional designation is made after receipt and examination of appellant's statement of the evidence (prepared partly in narrative and partly in question and answer form), appellees being dissatisfied therewith. Appellant has not furnished to appellees a corrected copy of the reporter's transcript, although appellees have in their possession the original reporter's transcript furnished at the conclusion of the trial below.

That the appellees (respondents) are advised by letter that the original transcript of the testimony has been filed with the Clerk of the Court and that the copies in the hands of counsel should be corrected as follows:

Page 23, line 5, insert word "not" after word "is," making it read * * * it is not a question * * *.

Page 27, last line, erase word "not" between words "did" and "secure."

Page 28, line 10, erase word "not" between words "did" and "make."

Page 33, line 8, change word "busy" to "business."

Page 52, line 16, change word "premium" to "Commission"—last word in line.

Page 53, line 4, change "and" to "a" between words "plus" and "fixed"; line 21, insert word "was" between words "testified" and "published."

Page 54, line 24, change word "find" to "determine." [318]

Page 56, line 19, change word "anything" to "anyone."

Page 59, line 5, change to read “paid to” instead of “to paid.”

Page 61, line 5 from bottom, change word “which” to “each.”

Page 65, line 3, change word “the” to “that” between the words “that” and “endorsement”—to read—“that that endorsement.”

Page 68, line 2, change word “party” to “part.”

Page 75, line 15, insert word “was” between words “which” and “identified.”

Page 75, line 16, change word “approved” to word “involved.”

Page 77, 6th line from bottom, change to read “the bond filed with the Industrial Accident Board.”

Page 79, 4th line from bottom, change to show the question asked by Mr. Whitla.

Page 80, change to show that these questions are asked by Mr. Horowitz.

Page 82, line 13, change word “carrier” to “contractor.”

Page 87, line 13, change word “is” to “are.”

Page 91, 7th line from bottom, change word “companies” to “cases.”

Page 113, line 16, change word “filed” to “field.”

Page 130, correct spelling word “individuals.”

Page 131, 8th line from bottom, insert “pay” between words “to” and “the.”

Page 140, line 3, change word “support” to “supply.”

Page 142, 4th line from bottom, change word “in” to “it.”

Page 147, line 10 and 11, change the words “practice” to “taxes.”

Page 154, line 15, change “Whitla” to “Horowitz.”

Page 162, change “3106” to “3016.”

Page 175, 3rd line from bottom, change “Whitla” to “Horowitz.”

Page 176, line 2, change “plaintiff’s” to “defendant’s”; line 5, change “Horowitz” to “Whitla”; line 8, change plaintiffs to defendants; line 15, insert the words “on the” between the words “is” and “constitutional” and insert the word “question” after the word “constitutional.”

Page 177, 7th line from bottom, change the word “or” to “before.”

Page 182, line 5, add “s” to the word “endorsement.”

The appellees (respondents) hereby move that the transcript of the testimony be further corrected in the following particulars:

Page 13, line 9, the word “refuned” should be “refunded.”

Page 27, second line from bottom. The phrase “discovery or replies” should read “discovery exists.” [319]

Page 42, line 2, insert after the word “reference” the words “in the stipulation.”

Page 46. The court stated that the return premium was not a rebate within the meaning of the statute. The court reporter has not included his statement in the transcript.

Page 60, line 4, the word “Traverls” should read “Travelers.”

Page 65, line 3, the reference to “the endorsements” should read “some endorsements.”

Page 75, line 17, the phrase “made this certificate” should read “approved this insurance.”

Page 87, line 12, the phrase “Navy approves the Travelers” should read “Navy approves the writing of the insurance here involved by the Travelers.”

Page 91, seventh line from the bottom, the phrase “normal companies” should read “casualty companies.”

Page 98, line 4, the phrase should read “No, that is the general practice.”

Page 135, line 3, the phrase “Home Office policy” should read “Home Office record.”

Page 135, line 6, the line reading “Home Office showing the endorsement space that has the endorsement” should read “Home Office showing in the endorsement space what is the endorsement.”

Page 140, line 3, substitute for the word “support” the word “show.”

Page 143, line 7, substitute for the word “plan” the word “form.”

Appellees further move that appellant’s counsel should be required to deliver the necessary copies of the reporter’s transcript of the evidence as contemplated and required by Rule 75 (b).

2. Appellees’ (respondents’) supplemental designation of additional portions of the record, proceedings and evidence to be included.

Dated this 20th day of February, 1948.

CHARLES HOROWITZ,
WM. S. HAWKINS.

(Service acknowledged.)

Filed Feb. 20, 1948. [320]

[Title of District Court and Cause.]

ORDER

Good cause appearing therefore,

It Is Ordered That the time for filing and docketing the transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, be and the same hereby is extended to April 19th, 1948.

Dated at Boise, Idaho, this 1st day of March, 1948.

/s/ CHASE A. CLARK,

United States District Judge.

Filed March 1, 1948. [321]

[Title of District Court and Cause.]

ORDER

The appellees having moved the Court for an order correcting the transcript, and the Court having examined the record and being advised,

It Is Ordered That the transcript be corrected, as requested, as to page 13, line 9; page 27, second line from bottom; page 60, line 4; page 91, 7th line from bottom; page 135, line 3; and page 135, line 6.

As to the other requested corrections, the motion is overruled.

Dated at Boise this 8th day of April, 1948.

/s/ CHASE A. CLARK,

United States District Judge.

Filed April 8, 1948. [322]

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD**

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 322, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same

constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this court for preparing and certifying the foregoing typewritten record amount to the sum of \$28.80, and that the same have been paid in full by the appellant.

In Witness whereof, I have hereunto set my hand and affixed the seal of said court, this 16th day of April, 1948.

[Seal] /s/ ED M. BRYAN,
Clerk.

[Endorsed]: No. 11901. United States Circuit Court of Appeals for the Ninth Circuit. Mary Broderick, Administratrix with the will annexed, of the Estate of Eugene H. Ware, deceased, Appellant, vs. The Travelers Insurance Company, a corporation, and The Travelers Indemnity Company, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Northern Division.

Filed April 19, 1948.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11901

MARY BRODERICK, Administratrix with the
will annexed, of the Estate of Eugene H. Ware,
deceased,

Appellant,

vs.

THE TRAVELERS INSURANCE COMPANY,
and THE TRAVELERS INDEMNITY COM-
PANY,

Appellees.

ORDER WAIVING PRINTING OF
ORIGINAL EXHIBITS

Good cause therefor appearing, It Is Ordered
that none of the original exhibits filed with the clerk
of this Court as a part of the certified transcript
need be included within the printed transcript, but
will be considered by this Court in their original
form.

/s/ FRANCIS A. GARRECHT,
Senior United States
Circuit Judge.

Dated San Francisco, Calif., April 29, 1948.

[Endorsed]: Filed April 30, 1948.

United States

Circuit Court of Appeals

For the Ninth Circuit

MARY BRODERICK, Administratrix
with the will annexed of the Estate
of Eugene H. Ware, deceased,

Appellant,

v.

THE TRAVELERS INSURANCE
COMPANY, a corporation, and THE
TRAVELERS INDEMNITY COM-
PANY, a corporation,

Appellees.

No. 11901

Brief of Appellant

*On Appeal from the District Court of the United
States for the District of Idaho,
Northern Division*

Ezra R. Whitla,

E. T. Knudson,

WHITLA & KNUDSON,

Res. and P. O. Address,
Coeur d'Alene, Idaho,

Attorneys for Appellant.

FILED

AUG 16 1948

PAUL P. O'BRIEN,

ALPHABETICAL CASE INDEX

- Atchison T. & S. F. R. R. Co. v. Rogers 113 Pac. 805
- Boundary County et al v. Woldson, 144 Fed. 2nd 17
- Boston Ice Co. v. Boston & Maine R. R. Co. 45 L. R. A.
Ns. 835
- Brakestone v. Appleton Mutual Fire Ins. Co. 135 N. W.
853
- Boise Payette Lbr. Co. vs. School Dist. 1—46 Ida.
403-268 Pac. 26
- Bone v. Hayes 99 Pac. 172
- Chrysler Sales Corp. v. Spencer 9 Fed. 2nd 674
- Chrysler Sales Corp. v. Smith 9 Fed. 2nd 666
- Credit Mens Adjustment Co. v. Vickery 161 Pac. 297
- Dighton v. First Exchange Nat. Bank 33 Ida. 273-192
Pac. 832
- Davis v. Mills 99 Fed. 39
- Farnsworth v. Haigland 300 Fed. 993
- F. & M. Bank v. Board of Education 162 Pac. 797
- First National Bank v. Weidenbeck 97 Fed. 863
- Gray v. Stearn 149 Pac. 26
- Great Western Mach. Co. v. Smith 124 Pac. 414
- Garrett v. Veitzel 48 Ida. 727-285 Pac. 472
- Graves v. United States 150 U. S. 118-37 L. Ed. 120
- Holmes v. Springfield Fire & Maine Ins. Co. 311 U. S.
606 85 L. Ed. 384
- Home B. & L. Assn. v. Blaisdell 290 U. S. 398—70 L.
Ed. 413
- Hauter v. Coeur d'Alene etc. M. Co. 39 Ida. 621-625-
228 Pac. 259
- Huntington v. Atrill 146 U. S. 676-36 L. Ed. 1131

ALPHABETICAL CASE INDEX

Continued

- Hoopeston Canning Co. v. Cullen 318 U. S. 319-87 L. Ed. 777
- Ill. L. & S. Bank v. State of Arkansas 78 Fed. 281
- Jossiffee v. Northern Pac. R. Co. 100 Pac. 977
- Jones v. Steinle et al 15 S. W. 2nd 164
- Keller v. Travelers Ins. Co. 58 Mo. App. 857
- Kelly Mause & Co. v. Sibley 137 Fed. 586
- Mutual Ins. Company v. Huntsberry 156 Pac. 327
- McFall v. Arkorsk 37 Ida. 243-215 Pac. 979
- Municipal See Corp. v. Buhl H. Dist. 35 Ida. 377-208 Pac. 232
- McComon v. Holden 35 Ida. 75-204 Pac. 656
- McPhee v. McGinnity Co. v. A. P. R. Co. 158 Fed. 5
- Osborn v. Oslin 310 U. S. 53-84 L. Ed. 1074
- Osborn v. Oslin 29 Fed. Supp. 71 P. 76
- O. Gorman & Young v. Hartford Fire Ins. Co. 282 U. S. 251 75 L. Ed. 324
- Prudential Ins. Co. v. Benjamin 328 U. S. 404-90 L. Ed. 1342
- Palmetto Fire Ins. Co. v. Com. 9 Fed. 2nd 202-204
- Queen v. Dayton Coal & Iron Co. 30 L. R. A. 82
- Ries v. Pacific F. & P. Co. 50 Ida. 140-294 Pac.
- Reeves v. National Fire Ins. Co. 170 N. W. 575
- Runkle v. Burnham 153 U. S. 216-37 L. Ed. 694
- Salt Lake City v. Salt Lake W. & E. Co. 174 Pac. 1134
- State v. Dist. Court 233 Pac. 122
- Stone v. Bradshaw 64 Ida. 152-128 Pac. 2nd 844

ALPHABETICAL CASE INDEX

Continued

- Sanborn v. Pentland 35 Ida. 639-208 Pac. 401
- Sorenson v. Kribs 161 Pac. 405
- Selma, Rome & Dalton R. R. Co. vs. U. S. 136 U. S.
560-35 L. Ed. 266
- Wright v. Union Central L. Ins. Co. 303 U. S. 502-83
L. Ed. 1490
- Wright v. Wilder 63 Ida. 122-117 Pac. 2nd 1002
- Whitfield v. Aetna Life Ins. Co. 205 U. S. 487-51 L.
Ed. 897
- Williams v. Travelers Ins. Co. 169 N. W. 609
- Willy v. Mulledy 32 Am. Rep. 536
- Wolf v. Smith 9 L. R. A. N. S. 338

SUBJECT INDEX

	Pages
Statement of case, Pleadings -----	2 to 6
Statement of case, Evidence -----	5 to 17
Court's Opinion -----	17
Only Commission Agents Authorized in Idaho -----	19
Specifications of error -----	20 to 25
Full commission -----	26 to 33
Contract construed to give affect to every word -----	36 to 38
Contract construed strongly against party preparing it -----	38 to 41
Statute cannot be evaded by any device -----	42 to 44
Statute declares public policy -----	44
Laws of state become part of contract -----	33 to 36
Defendant's exhibit I to Answer and VII in Evidence, if intended to evade stat- ute is itself against public policy and void and no defense -----	45 to 47
Parties setting up invalid contract cannot rely thereon -----	44 to 50
Defendants not producing agent who wrote letter explaining ambiguity, presump- tion his testimony against Defendant's contention -----	47 to 54

SUBJECT INDEX

Continued

	Pages
Supreme Court and Congress have, in substance, approved various states' statutes, many with same language as Idaho	55 to 58
So-called War Rating Scheme violates laws of State of Idaho and therefore prohibited by the plan itself, as well as state statute. Court's Opinion -----	17
Transcript -----	75
When Defendants assume to do business in Idaho they must comply with the regulations of the state -----	43
Policy does not comply with section 40-1107 therefore is construed as provided by the laws of Idaho and the obligations are governed thereby in Section 40-1201	61
Retrospective rating nothing new and frequently used as a cloak for rebating----	64
The statutes of the State of Idaho were enacted for the benefit of the agents and gives one of this class cause of action thereon though not specifically provided for in statute -----	66
Conclusions -----	68 to 74

IDAHO STATUTES INVOLVED

Risks to be written by licensed agents residing within state. Idaho Codes Annotated 40-901

Resident agents must countersign all policies:
“and shall receive full commission when the premium is paid.” 40-902

Policy must contain entire terms of agreement. 40-1107

Rebating in any manner, particularly agent's commission, prohibited. Section 40-1107

Where policy does not conform to statutes, disregarded and provisions of statutes govern. 40-1201

No. 11901

United States

Circuit Court of Appeals

For the Ninth Circuit

MARY BRODERICK, Administratrix
with the will annexed of the Estate
of Eugene H. Ware, deceased,

Appellant,

v.

THE TRAVELERS INSURANCE
COMPANY, a corporation, and THE
TRAVELERS INDEMNITY COM-
PANY, a corporation,

Appellees.

Brief
of
Appellant

STATEMENT OF THE CASE

This action is being prosecuted by Mary Broderick vs. the Appellees to recover commissions on account of insurance policies written for the construction of what is known as Farragut Naval Training Station in Kootenai County, near Coeur d'Alene, Idaho. The policies are particularly described in the complaint and it is alleged that Eugene H. Ware was a citizen and resident of Kootenai County, Idaho, and the defendants were corporations of the State of Connecticut, and the amount involved exceeds \$3,000.00. Eugene H. Ware and E. H. Ware are the same person and duly qualified and licensed resident insurance agent of Idaho doing business as Eugene H. Ware Company and that the defendants caused him to be

licensed as their resident agent in the State of Idaho. (P. 2 and 3.)

About the first day of October, 1936, they entered into a written contract with him to represent them in the territory of Coeur d'Alene and vicinity. (P. 16.) The contract provided that they would pay commissions as set forth therein, and part 1, sub-division "A" provides: "on workmen's compensation and employers' liability premiums, except underground coal mining risk, ten percent." (P. 17.) Some other forms of insurance are also provided for but the workmen's compensation is the principal thing. The contract provided that Ware should countersign policies of insurance (P. 19), and thereafter the company wrote Mr. Ware certain letters and sent him form statements. These are attached as exhibits "A-1 to A-9, inclusive." (P. 22 to 30.) Exhibit "A" is the original contract signed by the parties. They caused Mr. Ware and employees in his office to be designated as their attorneys in fact to sign all instruments. (Exhibit "B.")

It was alleged in the complaint that, while he was such agent, the company submitted to him for signing and he did sign the contract covering workmen's compensation for Walter Butler Company upon which \$295,265.00 was paid as an estimated premium (P. 9) and that a large amount of additional compensation was pending and that the total premiums due on this policy would amount to over \$900,000.00 (P. 12) and by reason of these facts more than \$90,000.00 became due the plaintiff as commissions on the insurance

premiums and, that by the laws of the State of Idaho, the defendant companies were required to have a resident agent sign all policies and the full commission on the premium was to be paid them for such signing.

They allege that they didn't know the full amount paid by Walter Butler Company and requested an accounting. To this, a motion to dismiss was filed and the case heretofore came to this Court upon an order of the District Judge and sustained the motion to dismiss. This Court reversed the decision of the lower Court, holding that, under the facts, the complaint was supported (*Ware v. Travelers Insurance Company*, 150 Fed. 2nd, 463).

Thereafter the defendants answered and in the answer again set up a claim that no cause of action was stated. (The answer appears, pages 35 to 50.) By the answer they admitted that the premiums on the policies at the standard rates amounted to \$1,200,211.06 for compensation, \$74,460.10 on another policy, \$13,768.80 on still another policy and on indemnity policy a premium of \$6,168.46, or a grand total of premiums of \$1,294,608.42 on the policies written in connection with the construction by the Walter Butler Company in Idaho.

They then allege that they had made a special arrangement whereby the premiums which they were to get were reduced to but \$236,813.40 for the compensation and on the other policies an additional sum, making a total of \$246,124.55 and made claim that

they were required to make this kind of policy carrying this rate.

To this answer a reply was filed admitting various items and denying the others and alleging that the amount set forth by them as a grand total, \$1,294,608.42 was actually collected and taxes paid thereon. (Reply appears fully, pages 51 to 54.) A trial amendment to the answer was filed when the case was called for hearing which appears pages 55 and 56. Upon the hearing a stipulation was entered into relative to the premiums on the policy and appears on pages 59 to 65, inclusive. In it, it was stipulated that the companies made a return to the Industrial Accident Board of premiums collected and paid taxes in the sum of \$449,556.01 and on February 26th, 1943, they reported to the director of insurance and paid 3% tax due on accident, health and personal liability and workmen's compensation in the sum of \$558,994.21 for the year 1942 and that for the years 1942, 1943 and 1944 they made returns of premiums of \$727,524.30, less \$439,417.90 and a tax was paid semi-annually to the Industrial Accident Board and annually to the Bureau of Insurance upon the basis of the amount of premiums for the period reported and that no refund of tax was made by the Industrial Accident Board or by the Bureau of Insurance for the State of Idaho on account of the return of premiums reported by the defendant, nor was any action ever taken by the Travelers Insurance Company to recover any taxes paid. It was further admitted in paragraph six, pages 63

and 64, that the defendants were actually paid \$694,823.87 on account of the policies in controversy and that they returned to Walter Butler Company the sum of \$440,985.33.

Upon this state of the record the case came on for trial and oral and documentary evidence was taken.

In the meantime Eugene H. Ware had died and his executrix, Mary S. Ware, had been substituted as plaintiff but she had also died and an administrator with the Will annexed of his estate was substituted in lieu of the Executrix.

The evidence taken on the hearing consisted, first, of the introduction and acceptance of the stipulation which was copied into the record and appears on pages 96 to 104.

It is proper to state here that in the beginning appellant furnishing an abbreviated record in which the matters appearing at other places and immaterial matters were eliminated but counsel insisted that the entire record should go up as it was and the record is encumbered by having many matters appear therein at various times. Illustration of this is the fact that the stipulation appears as filed in the Court (pages 58 to 65, inclusive). It appears again as part of the evidence on the trial. (P. 96 to 104.)

Attached to the complaint were various notices and letters, etc., which were admitted but many of them were also again introduced in evidence but are not

printed, appearing in the original exhibits directed to be sent up by order of the Court, thus making a record very long and cumbersome for the simple matters that are really involved therein.

The defendants set up by their answer a special affirmative defense in which they claim in the fourth defense, pages 48 to 50, that they made a supplemental written contract with Eugene H. Ware to countersign policies for \$5.00 a month "for handling a small amount of countersigning." This special affirmative defense the plaintiff denied and alleged that this agreement was not made in connection with any business developed by the plaintiff's contract and, if so construed, it was void under the laws of the State of Idaho. This so-called written contract is Exhibit 1 to Answer (P. 50) and shows that it was a letter written by somebody to Eugene H. Ware in which they had stated, in substance, that they would pay him \$5.00 a month "for a small amount of their countersigning service."

They also claim that the contract had been changed by a circular letter of June 1st, 1940, appearing as Exhibit "A-2" to the complaint, which reads as follows: .

"You are hereby informed that, until otherwise advised, on risks written on the retrospective or special commission basis, on risks or portions of risks *which are in states other than indicated in the territory described in your agreement* and on bonds involving execution or countersigning by another agent, providing your agency agreement includes surety lines, and commissions which

you may retain out of the premiums paid to the company, will be fixed on the basis of the individual risk, anything in your agency agreement to the contrary, notwithstanding."

The exhibits show returns made by the defendant company showing the large amount of money collected. The first was Exhibit 1 which was the contract policy itself and did not include various written exhibits which were then attached to it, neither did it include the certificate of the Secretary which the Secretary had placed on the policy (before delivering the same) but which was not a part of the policy (P. 105). This policy nowhere shows on its face or in any other manner than by subsequent endorsements placed thereon some time after it was written that any other than the standard rate was being charged. This becomes material because of the fact that the defendant undertook to say and the witness Peterson did testify at one time, positively, that it did show this, but after a lengthy cross-examination and demand that he point out where it appeared on the policy, had to admit that it was not there and that there was not a thing on the contract policy as written that showed any so-called war insurance rating endorsement on the policy when it was issued. (P. 146.)

The plaintiff also introduced in evidence the defendant's return to the Industrial Accident Board for the six months period, July 1, 1942, to December 31, 1942, of the collection of premiums in that time by the defendant company, \$449,556.01. This is Exhibit No. 2. The plaintiff then introduced No. 3 show-

ing the defendant's report to the Industrial Accident Board for the six months period, January 1st, 1943, ending June 30, 1943, all net premiums collected for workmen's compensation of \$171,492.14. In other words, it showed the premiums collected at the standard rate. Exhibit No. 4 was also marked and introduced in evidence for identification and showed earned premiums.

The defendant then produced as a witness Oscar W. Nelson, who had been engaged in the business of insurance in Coeur d'Alene and vicinity for 23 years. He testified that the regular full commission on workmen's compensation insurance in the State of Idaho and in the vicinity of Coeur d'Alene was ten percent (P. 109, 110), his answer being as follows:

“The usual practice is the standard rate of commission, ten percent to the local agent.”

Thereupon the plaintiff introduced in evidence various instruments, being Exhibits “A” to “R,” inclusive, and rested. These exhibits show the returns made by the defendant company showing the large amount of money collected.

The defendant then introduced as its principal witness, George E. Peterson, Secretary, whose testimony commences on page 130 and runs to 232, and commences again on page 246 and runs to page 255. He testified in substance that he had charge of the departments and knew of the matters involved and particularly the so-called ‘war rating plan.’

He testified that prior to the adoption of this plan all government agencies securing workmen's compensation or public liability insurance were required by Act of Congress to get four bids and let a contract to the lower bidder. (P. 139.) This is as provided for by law (Sec. 5, title 41, USCA; Title 34, Sec. 561, USCA and Title 34, Sec. 571, USCA) requiring this and prohibiting it being waived excepting to certain particular things.

The whole trouble seems to be that non-stock companies were getting the business and this was a scheme for big companies to get it (P. 135) and he then testified, that by this scheme, they eliminated commissions. (P. 136.)

He acted as one of the commission handling this matter for the government and at the same time was the secretary of the defendant companies doing the business for the defendants. (P. 136, 137, 138.) He was in Washington at the time of this proposal and apparently contacted the officials about it. (P. 138-139.) By this contract it provided that the government itself should pay a fee to a person called 'Insurance advisor' and eliminated the commission of the agent. (P. 141.)

He testified positively that each of the three policies he examined, which were the three in controversy, carried the 'War Projects Rating Endorsement' (P. 146). He testified the 'war rating plan' was on the policy in the beginning. (P. 148.)

He then, through a lengthy discourse, explained how they arrived at the amount under this policy—first, by eliminating the ten percent which we contend was the agent's commission, and then making other deductions according to the loss under the risk.

The Court, after hearing the witness testify, made this statement:

“here the testimony seems to show that the companies, before they started to do business, felt that they must have an agent to countersign these policies, and still there seems to be a scheme here to evade the law.” (P. 163.)

This was with reference to paying an agent for countersigning. He testified, however, in regard to this countersigning as follows:

Q. Subsequently to this letter of October 21, 1936, which is in evidence, were risks submitted to Mr. Ware for counter signature?

A. They were.

Q. *That is out-of-state business?*

A. *Yes, sir.* (P. 164.)

He then testified that if the company paid commissions they could not have done business. (P. 165.)

Much of his testimony is taken up with opposition to mutual companies. He again repeated elimination of the agent's commission was the major thing in the scheme. (P. 167.)

He then testified that under this procedure the contractor paid the insurance advisor a fee of \$10,586.61. This was charged back to the government, of course. (P. 171.)

He testified it was their general practice to have their policies countersigned in the local states (P. 173) but said the final adjustment was down to a premium of \$246,126.56. He then testified they had held up a settlement with the government because of this case. (P. 176.)

Pages 175 to 182, inclusive, he testified to the letters Exhibits "A" to "O" as being the entire correspondence with the advisor. Not only that, but the man who pretended to be the advisor's representative on the project, was also on the pay roll of the Walter Butler Company.

"A. He was on the pay roll of the Acme Brokerage Company—probably both." (P. 177.)

The letters show very little between the Acme Brokerage Company and the insurance company.

He then testified (P. 189) that the two defendant companies were associated in business, occupied the same building, with the same people working for them, and that in this case the insurance company wrote the policy and the indemnity company put up the bond and that he didn't know why they did it that way. (P. 189, 190.) He then testified that as to two accounts put in evidence, that one simply brought the

account up to a further date and that the first one was simply included in the last. (P. 191.) He testified he didn't know of any difference it would make.

When the copy of the insurance policy, Exhibit No. 8, was furnished, the Secretary added a certificate to it, that it was in accordance with certain things. *This was not offered by us.* However, on cross-examination, the witness admitted that without that certificate there was nothing on the endorsement of the policy that showed (3016) which was the so-called 'war projects rating plan.'

"Q. Not a thing?"

"A. No, sir." (P. 195.)

He testified they prepared the policies in Hartford and sent them to Mr. Ware to have the policies countersigned and returned to them and, at the same time, have him execute bonds and see that the bonds were properly filed with the officials of the state and that this was done. (P. 196-197.)

The evidence shows without conflict that they paid taxes to the State of Idaho in insurance premiums collected on these policies amounting to more than \$694,823.87. He testified he was on the committee before the war and acted on it from that time until after the war was completed (P. 198-199) and that he held the position of Secretary of the defendant companies during that time. (P. 199.) He then explained that a few of the mutuals and a few of the stock companies

got together and organized this plan dealing with the companies. (P. 200.) He also testified at another time his company wrote \$97,000,000.00 of business with the Government.

Defendants' Exhibit No. 7, which is a letter the defendants' agent wrote Mr. Ware which they claim is the contract for countersigning everything at \$5.00 a month, says:

“for handling a small amount of countersigning that will be necessary from time to time.”

It then says that “the payment for the month of October will be forwarded as of *November 1st* by the Auditor, and a like amount *each month thereafter* until otherwise advised.” It will thus be seen that by their own letter they were paying for a small amount of countersigning only which we contend did not apply to business originating in Ware's territory but to small passing matters passing through the office coming from some other section of the country entirely and also the letter provides the payments were being made the month after the work was done and for the preceding month and not in advance. (The letter appears P. 220.) The last check Ware got was dated May 11th. The policies countersigned were dated at the home office May 18th, secured by Ware about May 29, Ex. 21, and countersigned and returned on that date and not a cent was ever paid Ware *after the policies in question were countersigned by him.*

Peterson, in testifying in answer to a question by the Court, said:

“He countersigned policies other than these.

THE COURT: He countersigned other policies? A. Yes.

THE COURT: He was paid five dollars per month. Was he paid anything additional for signing these policies? A. No, sir.” (P. 223.)

Peterson again tried to testify that the ‘war rating’ was referred to in the policy itself but, upon cross-examination, he testified:

“Q. The endorsement is not specified in the policy?

A. It was not the practice of the company to do that.

Q. Why was it the practice to put in a part and not the balance?

A. No part except as they appeared as necessary.

Q. The rule was that you didn’t put in the policy, the contract itself, any endorsements that you were attaching to it?

A. We put the endorsements in that constituted a part of it. I have shown that they were attached.

Q. I asked you if you could find in the contract portion of the policy itself?

A. *No; it is not in the contract portion.*" (P. 226-227.)

On page 208 he gave another reason.

"Q. What was the practice in respect to each of these using these forms in inserting the number of the comprehensive plan endorsement?

A. *There was no space provided. It cannot appear on the policy.*

Turning to Exhibit No. 8, which is now in evidence, we find there is ample space for putting on dozens of these endorsements. Again on page 204 he testified:

"MR. WHITLA: This endorsement was not on the original policy as sent out?

A. *It is not the practice.*

Q. MR. WHITLA: That endorsement referring to the number of the endorsement was not on the original?

A. *Not noted on the policy. Neither was the other matter there.*"

The defendants' witness Jordon testified he resided at Spokane; was in the employ of the claims division at that place and that the company had an office on the project servicing the claims right there and that they had two men, Paul Shedler and George Sonickson, and the clerical staff that was necessary acting as investigators on the project and looking after claims and medical care for the men. (P. 232-233.) That, in cooperation with Walter Butler Con-

struction Company they kept a hospital on the ground and employed three doctors and kept a full force there looking after the business and that it was a joint operation between the defendants and Butler Construction Company. (P. 237 to 238.)

Evelyn Thomas Michaelson testified that she was the Evelyn Thomas who signed the policies for E. H. Ware and that the endorsement 3016 was not on the policy at that time. (P. 243.) She looked it over and, on redirect examination said they checked the policy to see what it covered because Mr. Ware was trying to contact the contractor to get the insurance business prior to the time the policy came in, and that the 'war projects rating endorsement' was not on it. (P. 245.)

George Peterson was again called and, from page 246 to 255, testified with relation to how mutual insurance companies were run, the commissions they paid and salaries, etc.

J. G. Adams called on behalf of the plaintiff, in rebuttal testified (pages 255 to 258) that he had been local agent and home office agent and branch manager of various companies and was familiar with their operations and testified to the amount of payment by them for their agents in this vicinity.

Oscar Nelson recalled (pages 258 to 265) testified about his qualifications, the companies he represented which included a general agency for the Idaho Compensation Company, and that they paid seventeen and

one-half percent commission. This was put in to meet the fact that the defendants had placed in evidence the Articles of Incorporation of the Idaho Compensation Company to show that they did have local competition and inferring that they didn't pay adequate commission rates but the evidence showed they were exceeding those of the defendants.

Thereafter the Court rendered its opinion in which he held:

“that it might be said the war rating plan was not authorized in Idaho and that it was set up with the thought of avoiding payments of commission.” (P. 75.)

He found definitely that the statute was made a part of the plaintiffs' contract; he found that the insurance company, in all of its actions, was subject to the regulation of the laws of the State and that they established the matters of public policy of the State and *could not be departed from by the parties*. “*I agree that they cannot be waived, and that the public policy cannot be departed from.*” (P. 76.)

He found that the full commission referred to in the statute to be paid was so indefinite that it did not provide for any commission and that the agent was not given the specific right to any particular commission.

He also found that the contract was countersigned in Idaho “so I think it can safely be said, at least, the contract was written and placed within the State.”

He then made his Findings of Fact in which he found various things to which exception had been taken, including the fact that the statute providing for full commissions did not give any definite standard of measurement. That the \$5.00 a month paid to Mr. Ware for countersigning a small amount of business prohibited him from recovery and entered judgment in favor of the defendants.

There is very little conflict in the evidence but much surplusage.

From the judgment in favor of the defendant this appeal is taken.

SALARIED AGENTS PROHIBITED BY THE STATUTE

The statute everywhere provides that it is only one who gets a *commission* who can counter-sign. The counter-signatures cannot be by a salaried agent. To do this is a violation of the law. This was one of the things that was directly in issue in *Osborn vs. Oslin* and is referred to in that opinion. 29 Fed. Supp. 71, Subhead 10 of the Syllabus, and again in the opinion on Page 82, where the Court said:

“The provision for counter-signatures needs little discussion. Such a requirement is quite common throughout the United States. The present statutory provision that the signature of a commission rather than a salaried agent shall be affixed to the policy is imposed as a safeguard to make certain that the commission agent, whose cooperation in the enforcement of the insurance statutes is desired, shall have knowledge of the issuance of policies and of his right to share in the commissions and in the subsequent activities under the contract.”

Therefore, this alleged contract for a \$5.00 a month salary is void and not a defense in this case.

SPECIFICATIONS OF ERROR

The Appellant specifies the following errors upon which Appellant will rely upon the appeal:

I.

The Court erred in his opinion in holding that Ware had a separate agreement to act as counter-signing agent for the reason that said alleged agreement was limited to a small amount of counter-signing business, and if construed to effect business such as that involved herein is against the public policy of the State of Idaho and void.

II.

The Court erred in holding that as a matter of law, the Plaintiff's right is wholly dependent on the statute for the reason that the contract established his agency, his right to act as their agent and their appointment of him as such agent, set the amount of the commissions and the law of the State required Defendants to pay the full commissions when policy counter-signed by him.

III.

The Court erred in holding that it was no basis upon which to arrive at the amount that would be due Ware for commission for the reason that the term "full of commission" means the full commission which is generally paid, and the Defendants, by their contract,

having agreed to pay 10% commission on workmen's compensation policies established the same as the full commission and there is no showing by them that any other sum or lessor sum whatever was the commissions on any kind of workmen's compensation policy.

IV.

The Court erred in making Findings of Fact No. 6, for the reason that the War Projects Rating Plan referred to as the basis for this findings, specifically provides that where the plan is not permitted by the laws of the State, it shall not be used, and the evidence is that the plan could not be used in Idaho, and for the further reason that by the statute of the United States the plan is not permitted and is an attempt by the Defendant company in association with others to violate the statutes of the United States, and also a scheme promulgated by the Defendants and others for the purpose of preventing certain insurance writers from obtaining the business contrary to the laws of the United States and the State of Idaho; that the Court specifically found in his opinion and the evidence shows that the contract was written and the same was placed in the State of Idaho and by said findings the Court makes no findings that this plan was permissible under the laws of the State of Idaho.

V.

The Court erred in making Findings of Fact No. 8, for the reason that the record shows that Eugene H.

Ware was the designated agent of the company of the Defendants and had authority to write insurance under his contract with them and counter-sign policies for them, and it was under the written contract with Defendants that this policy was counter-signed and the Court has found that the laws of the State of Idaho become a part of that contract and with the contract govern the transaction.

VI.

The Court erred in making Findings of Fact No. 9, in that said purported letter written by the Defendants was limited in its scope, did not pretend to take in such business as the business in controversy and is shown not to include this business and that after the policies in controversy were written, no sum whatever was ever paid Eugene H. Ware or anyone on his behalf for the counter-signing of said policies and that he received no sum whatsoever for counter-signing the policies in controversy and is entitled to the full commission therefore.

VII.

The Court erred in making Findings of Fact No. 11, for the reason that the policy did not become a valid policy until it was counter-signed by Eugene H. Ware and it required his signature to make the policy a binding agreement so that it could be filed with the proper authorities of the State of Idaho and enforced. It was made and placed in Idaho on Idaho property.

VIII.

The Court erred in making Findings No. 13, for the reason that the same is not within the issues of this case.

IX.

The Court erred in making Conclusions of Law No. 2, for the reason that the law does apply to the facts of this case and that the term "full commission" has been sustained by the Supreme Court of the United States.

X.

The Court erred in Conclusions of Law No. 3, for the reason that Eugene H. Ware was paid no sum whatever for counter-signing the policies in controversy and no agreement was made covering such policies.

XI.

The Court erred in making Findings of Fact No. 4, for the reason that the undisputed facts show that the Plaintiff was entitled to recover in this case for the full commission on the amount of the premiums paid.

XII.

The Court erred in entering a decree herein in

favor of the Defendants and against the Plaintiff dismissing this case for the reason that the record shows that the Defendants contracted to pay the Plaintiff 10% commission on all workmen's compensation policies and various other rates upon other classes of cases and that the law provides that when an agent counter-signs the policy, he is entitled to the full commission and the term "full commission" means the ordinary commission therefore; and when a rate has been fixed it will be taken as the full commission contemplated by the statute and said commission having been fixed and the undisputed evidence showing what the commission is, the Plaintiff was entitled to recover the amount thereof.

XIII.

The Court erred in not holding that the matter of full commission being sufficiently definite to entitle the Plaintiff to recover. It was involved on the appeal of the Circuit Court of Appeals and decided in favor of the Plaintiff under the decision of *Holmes vs. Springfield Fire and Marine Insurance Co.*, 311 U. S. 606—85 L. Ed. 384, and the question that full commission was not sufficient to state a cause of action was raised by the defendants in that case, fully argued by the Court, sustained, and is the law of the case.

XIV.

The Court erred in not holding and finding that the Plaintiff was entitled to 10% upon the workmen's

compensation policy involved and the other designated amounts on the other policies involved.

SPECIFICATIONS WILL BE GROUPED AND ARGUED TOGETHER.

ARGUMENT AND AUTHORITIES

The assignments of error will be grouped under heads and many of them can be presented together. SPECIFICATIONS OF ERROR 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, and 14.

First, it is our contention that the matter of the complaint alleging that we were entitled to the full commission and the decision of the Court sustaining this complaint as against the argument of the appellees of the former appeal establishes the law of the case. In that case as in this they took the position that the claim of 'full commission' meant nothing and established no rule to go by and that therefore, there was no pleading of any fact authorizing a recovery. If, under the facts pleaded in this case, the claim that we were entitled to the full commission as stated by the contract which the defendants had themselves drawn establishing the commission to be paid at ten percent, does not establish what the full commission is and our right to recover that amount, together with the evidence adduced at the trial which was not contradicted, then the defendants might have some ground to rely on. We think the decision in *Osborn v. Oslin*, (310 U. S. 53—84 L. Ed. 1074) is a complete brief on this. Particularly is the following applicable to this phase of the case:

“When these beliefs are emphasized by legislation embodying similar notions of policy in a dozen states, it would savor of intolerance for us to suggest that a legislature could not constitutionally entertain the views which the legislation adopts.”

In this case when the question of construing the law as to what is meant by ‘full commission’ is under consideration, the fact that this same provision of law is inserted in the laws of numerous states—Mississippi provides “and receive the full commission when the premium is paid.” Colorado provides “and receive the full commission thereon when the premium is paid.” Montana provides “and receive the full commission, etc., when the premium is paid.” We do not have the laws of all states at hand but most of them provide the ‘full commission’ or the ‘usual and customary commission’ and the law makers unquestionably intended it to be the same.

This matter was fully argued by counsel for appellants beginning on page 23 of their brief in this Court and continuing to page 27, so the matter was squarely presented to this Court before. Not only that, but this Court called attention to the Supreme Court’s decision in *Holmes v. Springfield Fire & Marine Ins. Co.* (311 U. S. 606—85 L. Ed. 384), in which this identical provision from the Montana law was in controversy.

In that case the insurance company brought an action to prevent the enforcement of the collection of

the premiums on insurance placed outside of the state on which the premiums were approximately \$865,000.00. The policies had been sent to Montana and there countersigned. The insurance company refused to pay the full commission and offered about one-half of it. The State Auditor asked for the opinion of the Attorney General on the validity of the statute and he rendered the opinion. In bringing the action to enjoin the State Auditor, the plaintiffs set up the opinion of the Attorney General in full as a basis of securing the injunction and it was on the construction placed on this identical clause in the Montana statute that the cause was decided. After detailing the facts, the Attorney General ruled:

“Therefore, it is my opinion that the State Auditor must insist that the full commission, in accordance with the definition herein, should be paid the counter-signing agent in all cases; *prior stipulations or contracts by the company or local agent notwithstanding.*”

In his opinion, set forth in the pleadings, in that case the Attorney General made this claim as to the phrase ‘full commission.’

“I find that ‘full’ means, as defined by Webster’s dictionary, ‘complete, entire, without abatement, mature, perfect’—a definition that has been approved in 85 Ill. 194, 195.

“ ‘Commission’ means percentage of allowance made to a factor or agent transacting the business of the company, *the whole of it*. Then it is clearly apparent that the legislature intended that the resident Montana agent *should receive the same*

commission for countersigning an insurance contract as he would receive for the same business if he secured it himself."

The insurance companies claimed this opinion was wrong and that the term 'full commission' was meaningless as the District Judge has held in this case. The three-man Court sustained their contention but, on appeal, the United States Supreme Court had no difficulty in finding that it did establish a basis and held the lower Court's action erroneous and reversed the case.

The opinion of the Attorney General of Montana which was sustained is terse, direct, conclusive, and means, in substance, that the party countersigning gets all of the commission the same as if he had written the policy and that no prior stipulations or contract between the company can be set up to interfere with it. In this case the appellees designated Ware as their agent but they wrote the contract. They specified ten percent on all workmen's compensation. *They never set any different amount.* The testimony adduced was that the full commission was construed ten percent generally on this class of business. Had they desired to disprove this, they had the opportunity to do so. They did not do so, and, as the Supreme Court of the United States had no difficulty in finding that this was a proper basis for a cause of action, we are at a loss to find where there is any reason for the Court not applying the rule provided for by the statute.

O’Gorman & Young v. Hartford Fire Insurance Co.

(282 U. S., 251—75 L. Ed. 324), was the early case upon the right to enforce such statutes. There the insurance companies took advantage of the act to be relieved from an excessive claim. In that case it limited the rate to a reasonable sum and the Court held:

“The statute under review does not prescribe a schedule of rates or point out the basis for determination of reasonable rates; it leaves with each company the primary right and duty of deciding upon rates to be demanded. But it inhibits payment to any agent, irrespective of the worth of his services and without regard to any contract with him, of anything in excess of what may be actually paid to another agent.”

They then hold that under that law, the lowest sum paid to any agent would be taken as the reasonable rate and no other agent could collect in excess of that.

The Idaho statute, set forth on page 71 of the record, in the Court’s opinion, provides that when there is a licensed broker “the countersigning agent shall receive a commission of not less than five percent of the premium.” This would indicate the very least under any circumstance that could be paid would be five percent and that was when two participated and evidently divided the fee.

Not only that, but after all of these matters had been up the Supreme Court of the United States was again called upon to pass upon the general construction of these laws. *Prudential Insurance Company v.*

Benjamin (328 U. S., 404—90 L. Ed. 1342), where they say:

“Obviously Congress’ purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it ‘shall be subject to’ the laws of the several states in these respects.

“Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.”

Robertson v. California (328 U. S. 440—90 L. Ed., 1366), is to the same effect. These decisions amount to the fact that the Supreme Court of the United States considers that these laws are all now approved. The fact that in *Holmes v. Springfield F. & M. Insurance Co.* the Court found so little in the respondents con-

tention that 'full commission' was meaningless, that it decided the case in this terse opinion:

"October 14th, 1940 (*procurium*) the judgment is reversed."

Osburn v. Ozlin (310 U. S., 53—48 L. Ed. 1074—60 S. Ct. 758), "rehearing denied. November 12, 1940."

The brevity of this decision and its decisiveness was such that it cannot be construed in any other way than the United States Supreme Court held, that they had little patience with such attempts to evade the law as was involved in the Montana cases and as involved in this one.

Hoopeston Canning Co. v. Cullen 318 U. S. 319—87 L. Ed. 777, shows the reach of such statutes as here involved.

The contract with Ware set forth on sub-division 8, page 19 (T), specifically provides:

"the agent is authorized to countersign policies of insurance, renewal receipts, certificates, and endorsements pertaining to the lines of insurance covered by this contract, unless otherwise advised."

The statutes covering this is as in the opinion of the Court, page 71 and again in the Findings of Fact, page 88, Finding 10, the material part of the statute is as follows:

“A resident agent shall countersign all policies so issued (except policies of life insurance) *and shall receive the full commission when the premium is paid * * **”

Having created Ware the agent to countersign policies, this section of the statute is unquestionably read into the contract and becomes a part of it.

Home Building & Loan Ass'n v. Blaisdell (290 U. S., 398—70 L. Ed. 413), where the United States Supreme Court says:

“This Court has said that ‘the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement.’”

Wright v. Union Central Life Insurance Co. (304 U. S., 502—83 L. Ed. 1490), where the U. S. Supreme Court said:

“Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.”

Dighton v. First Exchange National Bank (33 Idaho, 273—192 Pac. 832):

“That law became a part of the contract and was and is binding on the appellant as if it had been expressly agreed that the grantors named in

the deed might remove from the state and thus keep respondent's mortgage in force."

The following authorities sustain the ruling:

Farnsworth v. Haigland, 300 Fed. 993.

"A party to a contract embodies the statute of the state therein."

F. & M. Bank v. Federal Reserve Bank (263 U. S., 649—67 L. Ed. 1157);

Farley v. Board of Education (162 Pac. 797).

The Court in the opinion recognized this and, in substance, held that such was the fact but said (P. 73):

"The Court will not consider whether there is a right of recovery for the countersigning service rendered by Eugene H. Ware under the provisions of the agency contract dated October 1, 1936, *as that is not before the Court.*"

Again (P. 74):

"There is nothing in the evidence to indicate that Ware was to receive any special commission for approving and countersigning the so-called home office policies. There is no contract in existence here between Ware and the defendants for a stipulated commission.

Page 75 the Court said:

"In a proper action it might be said that the war rating plan, under which the insurance involved in this action was written, was not permissible under the Statute of Idaho. It seems without question that the plan was set up with the

thought in mind of avoiding the payment of commissions, but regardless of that fact the Court is unable, after reading the statute into and making it a part of the contract, which provides that he shall have the full commission when the premium is paid, determine what, if any, commission could be allowed when no commission is agreed upon and no commission is paid.

The agency contract expressly provides in part 1, page 17:

“On workmen’s compensation and employers’ liability premiums, except underground coal mining risks, 10 percent.”

That establishes what the full premium on this class of business in Idaho is and the testimony was definite and undisputed on that question.

The contract then states (Paragraph 8, Page 19):

“The agent is authorized to countersign Policies of Insurance * * *”

Therefore reading the statute quoted into it, it would say ‘and shall receive the full commission for so doing.’

Now, the Court holds that the statutes should be read into this contract and, if so, it makes a perfect agreement between the parties. Taken in view of the fact that this is the exact position taken by the Attorney General of Montana which the insurance companies there contested, and that his opinion was the gist of the action against Holmes, it shows that the Supreme

Court of the United States had no difficulty in solving that question.

The reason for exhibit A2 to the Answer explains this notice fully. It will be noticed it is dated June 1, 1940. *Osborne v. Ozlin*, 310 U. S. 53 was decided April 20, 1940. By that decision, the law of the various states that agents were entitled to collect commissions for counter-signing was definitely upheld. It shows upon its face that the acting secretary was notifying the agents of a condition which might arise where they wrote insurance going into some other state and which had to be countersigned in such other state so that the company would not be liable for double commissions under this decision. Reading the letter we notice that this particular statement conclusively bears out that agreement:

“on risks or portions of risks which are in States other than that indicated in the territory described in your agency agreement.”

In other words they were not going to be caught where they had to pay double agents commission. Eliminate this provision from the notice and it would bear out the appellees condition, but insert it and it limits the former statement definitely *to risks or portions of risks which are in states other than that indicated in the territory described in your agency agreement*. If it is to be construed now as counsel contends for, then this limitation is wholly without any affect. Counsel now wants to remove from their own unilateral writing, which they prepared themselves and which Ware

had nothing to do with, the most material part of that notice. To do this would be to violate all rules of construction.

First, every word and sentence in a contract must be given affect.

Second, if there is any ambiguity regarding the contract it is construed *against the party making it*.

Under the first heading a judgment is construed so as to give affect to every sentence and word in it.

Salt Lake City v. Salt Lake W. & E. Co. 174 Pac. 1134;

State v. District Court, 233 Pac. 957;

Boundary County v. Martin Woldson, 144 Fed. 2nd 17;

Wright v. Village of Wilder, 63 Idaho, 122—117 Pac. 2nd 1002.

“Generally, the various provisions of a contract or statute must be so construed, if possible, as to give force and affect to every part thereof.”

Stone v. Bradshaw, 64 Idaho, 152—128 Pac. 2nd 844.

That contracts will be construed against the party drawing them where there is any question of ambiguity whatever or any question of the construction, is well settled.

Ries v. Pacific F. & P. Co. 50 Idaho 140—294 Pac. 336, where the Court said:

“The contract as made was prepared and submitted by appellant, and the language of the whole thereof being ambiguous or uncertain, the rule is that the contract should be construed most strongly against the party preparing it or employing the words concerning which doubt arises.”

The following cases clearly establish this rule.

Hauter v. Coeur d'Alene, etc. M. Co. 39 Idaho 621, on rehearing 625—228 Pac. 259 where the Court said:

“The insurer fixes those terms, and it is a well settled rule of construction that the conditions of a contract will be construed most strongly against the party who uses them.”

But that was intended to notify the agent that, under the decision of *Osburn v. Ozlin*, if any risks were written by him that applied in another state, then they would have to re-arrange his commission as then they would have to pay commissions in other states as well. To read it otherwise would mean that they were making a rather uncertain statement completely ambiguous and unintelligible so that no one could understand what it meant, but reading it in the light of *Osburn v. Ozlin*, it is plain as can be and was limited to ‘on risks or portions of risks which are in states other than that indicated in the territory described in your agency agreement.’ It was not intended to say and did not say that ‘on contracts within the territory embraced in his agency agreement, viz., Coeur d’Alene and vi-

cinity where the Farragut Naval Training Station was situated that this would not be paid' and it did not so state.

ASSIGNMENT OF ERRORS 1, 5, 7, 10 AND 14

SPECIFICATIONS OF ERRORS 1, 5, 6, 10

The Court erred in holding, deciding and finding that the letter, Exhibit 7, constituted any contract covering any part of the insurance involved in this proceeding.

The defendants pleaded as a special defense, the letter, Exhibit 7, written to the plaintiff, defendants Exhibit 1 appearing on pages 50 and 51 of the transcript. The reply specifically denied that this had anything whatever to do with the matters in controversy and that it was never written for the purpose of waiving any fees on any business in the territory covered by Ware's agency contract. (Paragraph 3 of reply, pages 53 and 54.) They were specifically put on notice that this was only a small amount of out-of-state business in which, for some reason, the contract should be countersigned in Idaho, but nothing developed in the territory covered by Ware's contract, so that there was no question about this and defendants themselves proved this on the trial, and their Secretary, George Peterson, testified to that fact. (P. 164.)

“Q. Subsequently to this letter of October 21, 1936, which is in evidence, were risks submitted to Mr. Ware for counter-signature? A. They were.

Q. *That is on out-of-state business?* A. Yes, sir.”

So it is at once apparent that this proposal had nothing to do with anything in controversy.

Again, the reading of this letter indicates that very thing. This letter says:

“Following Mr. Gilbert’s explanation of our proposed arrangement to reimburse the Idaho agency *for a small amount of counter-signing* that will be necessary from time to time, I recommended to our home office that your agency be recognized in this matter.”

It will be noticed that it referred to ‘handling a small amount of counter-signing that would be necessary from time to time.’ At no place does it indicate that it was any business arising in Ware’s territory or having any connection therewith.

Again, the payments for this were to commence November 1st. ‘Payment for the month of October will be forwarded to you as of November 1st by the Auditor and a like amount each month thereafter until otherwise advised.’

It will be noticed on this small amount of counter-signing he was to be paid *the succeeding month for the counter-signing of the preceding month.*

Mr. Ware was dead. His testimony on that cannot be secured. The only other person who knew of that was their agent Gilbert. He was not produced at the trial and Peterson testified it was on some counter-signing of out-of-state business. If there were a few

automobiles had drifted into Idaho on which renewal policies should be issued, for the benefit of finance companies in the east and they desired Ware to countersign them, which was no business he had anything to do with or covered anything only a business agency contract, and paid him a small fee for services which are of such small amount that the bookkeeping embraced in the ordinary entry would have been worth more than a policy they had and right to do so. On the other hand, this is construed as it is now claimed that it was, namely, to be a method of evading the payment of the statutory commission which was illegal and not permissible and couldn't be set up as a defense.

The Court, in its opinion, admitted that generally such contracts would be invalid and said (P. 76):

“In viewing this statute I am taking the position that the Insurance Company in all its operations is subject to the regulations of the state as to rates, agency contracts and terms of the policy, and when the legislature has acted upon these matters they become public policies of the State and can not be departed from by the parties. I agree that they cannot be waived, and that the public policy cannot be departed from.”

This is unquestionably the law and they cannot do indirectly what they cannot do directly. If that is so, therefore any contract that they intended to make and avoid the payments of the commission which the statute provided for, would itself be a violation of that public policy and therefore void.

Whitfield v. Aetna Life Insurance Company (205 U. S., 487—51 L. Ed. 897), where the Court says:

“An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. *If it does business at all in the state, it must do so subject to such valid regulations as the state may choose to adopt.*”

The contract is mandatory and obligatory alike on the insurance company and the assured. Its object was to prohibit and annul such stipulations in policy and *it could not be waived or precluded by any form of contract or by any device whatever. William V. Travelers Insurance Company* (169 NW, 609, on page 610):

“When the legislature declares, as it has by this section in question, the public policy of the state to be that which had heretofore been subject to contract between the parties shall thereafter be by certain prescribed forms and with specific conditions concerning the respective rights and duties of the parties thereto, *the statutory provisions step in and control the legal and mutual rights and obligations rather than the provisions of any contract the parties may attempt to make varying therefrom.*

Boston Ice Co. v. Boston & Maine R. R. Co. (45 L. R. A. ns 835), where the Court held:

“That, as corporations, the plaintiffs in interest have only such rights of contract as the state permits; that, as the result of legislation, the business of insurance is no longer a private right, but a matter of public concern, a franchise subject to regulation by the state for the public good.”

Mutual Insurance Company v. Huntsberry (156 Pac. 327) ;

Reeves v. National Fire Insurance Co. (170 NW, 575).

These laws are as much a part of the policy of insurance as though written therein, and are controlling certain other provisions conflicting with those actually contained in the policies.

Brakestone v. Appleton Mutual Fire Ins. Co. (135 NW, 853) ;

Keller v. Travelers Insurance Co. (58 Mo. App. 857—561).

Cited with approval by United States Supreme Court and in that they said :

“this was, in effect, the legislative declaration of the public policy of the state.”

The public policy, of course, is established by the statutes of the state.

Sanborn v. Pentland (35 Idaho, 639—208 Pac. 401) :

“The public policy of the state in this instance is determined by the statute itself.”

Boise Payette Co. v. School Dist. 1 (46 Idaho, 403—268 Pac. 26) :

“The public policy of a state is to be found in the constitution and statutes without regard to all provisions thereof bearing on the particular subject under consideration.”

McFall v. Arkoosh (37 Idaho, 243—215 Pac. 979):

“Public policy, it must be born in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted, not for the benefit of the parties, but for the public.”

It must be born in mind that rule is never set up or relied on under an illegal contract, but defendants are the ones that do that very thing, if this contract is construed as they contend. That being so, ‘he who relies upon the illegality, is the one who is denied relief!’

McConnon v. Holden (35 Idaho, 75—204 Pac. 656) on page 82 where the Court said:

“It has been held that when a plaintiff can maintain his cause of action without the aid of an illegal act or an illegal agreement, he will be entitled to recover.”

Municipal Sec. Corp. v. Buhl H. Dist. (35 Idaho, 377—208 Pac. 232), the Court said:

“In order that illegality may prevent a recovery upon a contract, it must inhere in the contract relied upon.”

If a resolution appointing the fiscal agent is illegal, as it probably was, it could not have been enforced, *nor could it be set up as a defense in any action brought upon a contract to repurchase.* On rehearing the Court said:

“Where a contract contains illegal provisions, and also a separable legal agreement, the latter

will be enforced *if no necessity exists for reliance by the party seeking to enforce it upon any of the illegal provisions thereof.* * * *

“In this regard the contract was illegal and the Hanchett Bond Company was charged with the knowledge of the law, as well as the Commissioners of the District.

“Respondents in this action, however, in seeking to enforce only one provision of the contract which is as follows: * * * (stating provision)

“The provision in the contract quoted is separable from the remainder of the contract, and may be enforced without necessity of reliance upon any illegal provision thereof.”

Thus the general rule is that where the Plaintiff is not seeking to enforce any illegal provision but the Defendant is asking the Court to construe a unilateral contract prepared by it so as to make the contract illegal in order to escape liability and set up such illegal contract as a defense, the Court will not consider it a defense, or relieve the Defendant from liability on such a claim.

When a part of the divisible question or contract is *ultra vires* or illegal, but not *mala in se*, and the remainder is legal, the latter may be sustained and enforced unless it appears from the construction of the whole question or contract that it would not have been made though apart it is *ultra vires* or illegal.

(*Ill. T. & S. Bank v. State of Arkansas*, 78 Fed. 281 "C. C. A.")—"On the other hand the true rule is, and ought to be, the converse of that proposition." It is that when a part of the divisible contract is *ultra vires*, without any *mala in se* nor *malum prohibita*, the remainder may be enforced unless it appears from a construction of the whole contract that it would not have been made independent of the part which is void.

McPhee & McGinnity Co. v. A. P. R. Co. (158 Fed. 5)

"When a part of the divisible ordinance or statute and another part is without, the power of the body which enacts it, the form is valid and may be enforced although the latter is void, unless it appears from a construction of the entire ordinance or statute that would not have been enacted if apart it is void."

In this case, therefore, the defendants have sought to construe this contract is making it illegal and claimed that it annulled the provisions of the statute, they are barred from setting it up.

Again, one other thing is conclusive, and that is that where defendants' own agent wrote the notice which they are now trying to construe in a manner different from what it says on its face and put a new construction on it, it is illegal and contrary to what plaintiff sought by showing the true contract and contrary to their own Secretary's evidence, it certainly will be presumed that where they did not produce the witness who wrote it, his testimony would be adverse to them.

What has been said as to assignment of error Number 6 referring to construction of contract apply equally under these assignments as to the construction of the Defendant's Exhibit 7. Exhibit 7 does not say what counsel contends for it and is not and was never intended as a proposition for Ware to countersign everything Defendants submitted to him. This again, is not a bilateral contract. It is a unilateral writing sent by the Defendant to Ware. It did not purport to say that you will countersign for *all* policies for us at \$5.00 a month. It is couched in very indefinite language and says a *small amount of counter-signing*. It did not say that any of the provisions in the contract creating Ware an agent in Idaho or as to any business within his territory were to be waived. This contract does not purport to say that Ware was to countersign policies which any other person should write within Ware's territory or by appellee, but referred to out-of-state business only. Defendant's evidence shows that conclusively.

Peterson, P. 164.

Q. Subsequent to this letter of October 21, 1936, which is in evidence, were risks submitted to Mr. Ware for counter-signature? A. They were. Q. *That is out-of-state business?* A. Yes, sir.

As far as the evidence shows, nothing but out-of-state business was submitted to Ware for counter-signing. Nothing that was within Idaho or in his territory. There was only a small amount of this. In

other words, if some automobile finance corporation had policies on cars that had come into the State of Idaho and wanted to renew them to protect their finance, the company writing them would send the policies to Ware to be counter-signed. It was never intended to be a general counter-signing signature. If it was, why limit it? The fact that it was limited itself means that the party who prepared it knew it was *not* to be a general counter-signing agreement. It was never intended as a general counter-signing agreement. If it had been, it was void under the statutes of Idaho and the Court so found. You cannot evade a rule of public policy by making a contract to circumvent it. Again this was a special defense. The Plaintiff did not bring this into the case *but the Defendants did*. They had to rely on proving an invalid contract and when they did, they had no right to rely thereon. The rule is that the party setting up and relying on an illegal contract is the one who is barred and that it does not effect the other party whatever.

Why did the appellee not introduce the testimony of the witness who wrote this letter if anything other than what the appellant claims was understood? They knew of our claim on this. The Plaintiff specifically plead her claim and set up in Paragraph 3 of the reply, Page 53, in regard to this alleged letter:

“was ever written for the purpose of waiving the fees on any business developed in the territory covered by Plaintiff’s contract with the Defendant and deny that it had any reference to business

written within the territory served by the Plaintiff or included in his contract whatsoever, etc.”

We then alleged that if it was so construed it was null and void and was in controvention of the statutes of Idaho. The Defendants and they alone had the only living witness to this controversy. We only know what Mr. Ware had told us and which exactly bears out the statement of their own secretary Peterson. The fact that they had this witness accessible, who was an agent of theirs and who handled this transaction, and did not produce him, certainly brings them within the rule that failure to produce such witness under these circumstances raises a presumption that his testimony would be against them. The rule is that where the evidence is within the possession of the party alleging the fact or is under his control, that the burden rests upon him to produce it, and failure to do so raises a presumption that if produced, it would be against him.

The agent that wrote the letter was their agent. They did not produce him or show what he intended and the presumption is that, therefore, that would have been unfavorable. This has always been the law of Idaho.

It is generally followed:

Garret v. Neitzel, 48 Idaho 727-285 Pac. 472, where the Court said:

“When evidence tends to prove a material fact imposing liability on a party, and he can produce evidence rebutting the case made against him, if

it is not founded on fact, but refuses to do so, it must be presumed that the evidence if produced would operate its prejudice and support an advisory *especially where one charged with suspicious or apparent dishonorable conduct has an opportunity to explain it away and fails to do so.*"

Bone v. Hayes 99 Pac. 172 Cal.

"In determining whether the evidence supports findings below, the Supreme Court like the Trial Court, must be guided by rules of law governing the effect of the production or withholding of particular evidence."

In the opinion the Court lays down the rule:

"It is a well settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not found on fact and he refuses to produce such evidence the presumption rises that the evidence, if produced, would operate to his prejudice and support the case of his adversary." (Citing many cases.) * * *

"Silence, under such circumstances," says the Court of Appeals of Maryland in *Keller v. Gill*, 92 Md. 190, 48 Alt. 69, "is little less than a formal confession of guilt and a Court of equity cannot be expected to say that the charges are unfounded or that the evidence is untrue, when there is nothing in the record to refute either, and when the parties charged with fraud have failed to repel it by their own testimony."

Sorenson v. Kribs, 161 Pac. 405 Ore.

"When a fact is peculiarly within the knowledge

of a party, he must, if necessary, furnish the evidence thereof.”

At. S. F. R. R. Co. v. Rogers 113, Pac. 805 N. M.

“Where a negative condition lies peculiarly within the knowledge of the other party the averment of such condition is taken as true unless disproved by such other party.”

Applied to the facts at bar, this is very fitting. Here we alleged that this letter did not apply to contracts such as the one involved. The evidence of their own secretary Peterson showed that the only thing he knew of was out-of-state business. The contract said “a small amount of counter-signing” and they did not meet the issue or prove anything to the contrary. The presumption therefore, is against them, and having in no manner met this issue of their affirmative defense it was error to construe an ambiguous contract as has been done.

Jossiffee v. Northern Pac. R. Co. 100 Pac. 977
(Wash.)

“Where it is necessary to make a character of proof which, under the circumstances, is exclusively within the knowledge of one or the other of the parties, the burden of proof is on the party in possession of such knowledge.”

That is particularly fitting here as here the burden of proof was on Defendants in the first place as it was an affirmative defense. This rule has always been sustained by the Federal Courts.

Selma, Rome & Dalton R. R. Co. v. U. S. 136
U. S. 560; 35 L. Ed. 266.

“In order to prevent this, it has been established, as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant.”

Graves v. United States 150 U. S. 118, 37 L. Ed. 120.

“The rule even in criminal cases is if the party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.”

Runkle v. Burnham, 153 U. S. 216, 37 L. Ed. 694.

“The Doctrine that the production of weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice,” was expressly adopted in the case of *Clifton v. U. S.* 45 U. S. 4 How. 242.

Jones v. Steinle et al. 15 S. W. 2nd. 164.

“The failure of proponent of a Will to produce or account for such other attesting witnesses, in addition to the one testifying, raises presumption that the other witnesses, if produced, would testify that the Will was not signed by them in the presence of the testator.”

These matters are particularly strong in this case.

1st. Because the party with whom the transaction was had is dead and his testimony cannot be produced.

2nd. Defendants agent wrote it and he couched the contract in indefinite terms and certainly they cannot ask for it to be construed in their favor but under the rule of law elsewhere cited, the agreement is construed against the party who draws it.

ASSIGNMENT OF ERROR NO. 3, 9, 10, 11, 12,
AND 13.

These all relate to the Court's holding that there was no basis for finding an accounting due. The statute specifically says: (Section 40-902.)

“A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premium is paid.”

This is also in the statutes in numerous other states and so the statute that was in force in *Holmes v. Springfield Fire & Marine Insurance Company, supra.*, the intention of all of the statutes is unquestionably the same. Some phrase it in a little different manner until a recent uniform law was brought out for the purpose of complying with the McCarran act and most of them have said the same as Idaho, namely—“full commission.” Others said “usual commission.” Others said “customary commission” and various other phrases were used. If we assume the Court's position is correct in stating an exact amount, then all these decisions have been for nought because as the decision of the United States Supreme Court was rendered as no commission was provided for. The Court's contention that, because it didn't state an exact amount that was to be payable, never could be collected, is so far afield that it would seem that all of the decisions on this question being decided under various statutes, it has practically covered the field.

In *O'Gorman & Young v. Hartford Fire Insurance Co.* (282 U. S. 251), it was “a reasonable amount.”

In *Osburn v. Ozlin* it was “not less than one-half the customary commission.” If the Court is right, then the *Ozlin* case should be reversed because there was no amount specified; *Holmes v. Insurance Company* is set aside because there was nothing specified in that. But that is not all. Since these cases have been decided, the matter has been in Court several times in addition and, at all times, has been sustained, which, in our opinion in the case, the fact that the Courts have settled this question.

Palmetto Fire Insurance v. Conn. (9 Fed. 2nd, 202—204)

In that case the Federal Court brushed aside the contentions of the company and said:

“In other words, it cannot accept the benefits of the rights and privileges of doing an insurance business in Ohio and reject the conditions imposed by statute.”

Chrysler Sales Corp. v. Smith (9 Fed., 2nd, 666) where the Court again sustained the state laws.

Chrysler Sales Corp. v. Spencer (9 Fed. 2nd, 674), where the Federal Court again had no trouble in arriving at a conclusion in the case.

Prudential Life Insurance Co. v. Benjamin (328 U. S. 404);

California v. Robinson (328 U. S. 462).

It will be noted that in the statute all the way through it provides the agent must be paid a commission. Pay-

ment of a small stipend of \$5.00 per month is not and never was commission. This was clearly a contravention of the law which would seem to need no authorities. The word commission means "percentage." *Gray v. Stearn* (149 Pac. 26, page 29),

"The same work defines the word 'commission' as used in commercial law, as follows: The recompense or reward of an agent, factor, broker or bailee, when the same is calculated as a percentage on the amount of his transaction or on the profit to the principal."

Kelly, Mause & Co. v. Sibley (137 Fed. 586),

"It is insisted, however, that these contracts are not contracts of sale, but contracts having agency only. This contention is predicated chiefly upon the use of the word 'commission.' Undoubtedly that word is usually employed to mean 'compensation allowed agents,' factors, executors, trustees, receivers, and other persons managing the affairs of others in recompense for their service."

This is the general definition of 'commission,' and where was any commission ever paid Ware? Nothing of the kind was ever done.

There is another thing about this, and that is that Ware was hired for \$5.00 a month to countersign 'a small amount of business.' The evidence in this case is positively that he received no sum for signing these agreements.

There is another very important thing in this case and that is the fact that the witness Peterson, not on one occasion but on numerous occasion, testified that the entire plan of the policy was built up on the theory that they would not pay any commissions. The witness Peterson testified that prior to the innauguration of this plan they had to follow the statute and get four different insurance carriers to make a bid and it always went to the lowest bidder (P. 134).

“They had to get four bids from four different carriers without distinction as to the qualifications of those carriers, and it was necessary to assign it to the lowest bidder, and it was apparent that in order to make available all of the insurance facilities to the United States—this was recognized by the War Department, first—.” Objection sustained.

Again on page 135 he answered:

“A. It was on the lowest bid basis, and it would all go to the non-stock companies.”
He then testified (P. 136):

Q. What was eliminated to make that possible?

A. The matter of paying commissions in connection with the premium, which was developed under the plan.

Then to show what the premium was, they were required to figure on the basis of the standard rate but they took ninety percent of it, having eliminated the ten percent that went to agents commission:

“and the sum of all these various things, that becomes the final premium under the plan, subject, however, always to the maximum of ninety per cent of the standard premium.”

(P. 150.) The so-called plan which the witness Peterson and others promulgated was introduced in evidence as Exhibit 18. This plan specified on its face that it is not to be used in states where the laws of the state prohibit such things.

SPECIFICATIONS OF ERROR 2, 6, 4

Again the witness Peterson testified that it would have been impossible to have written this type of contract if any commission would have been paid (P. 165). After they got this plan working, they apparently did a big business. The witness testified to their business amounting to \$97,000,000.00. (P. 133.)

The statutes of the state prohibits the writing of policies unless commission is paid and therefore the agreement to do this made the practice absolutely illegal in Idaho.

Again, the policy contract does not show on its face it was written on any retrospective basis nor is there any signed endorsement on the face of the policy referring to any retrospective showing. The statutes of Idaho, Sec. 40-1107, Idaho Code, provides:

“No insurance company, association or society, by itself or any other party, and no insurance agent, solicitor or broker, personally or by any other party, shall offer, promise, allow, give, set off or pay directly or indirectly, as inducement to insurance or in connection therewith, on any risk in this state, now or hereafter to be written, any rebate of or part of the premium payable on the policy or on any policy or of the agent’s commission thereon; nor shall any such company, association or society, agent, collector or broker, personally or otherwise, offer, promise, allow, give, set off or pay, directly or indirectly as inducement to such insurance, or in connection therewith, any earnings, profit, dividends or other benefit, founded, arising, accruing or to accrue on such insur-

ance or therefrom, or any other valuable consideration as inducement to insurance or in connection therewith, which is not specified, promised or provided for in the policy contract of insurance.”

This is of the utmost importance because after a lengthy cross-examination it was finally admitted that the war rating plan was neither on this policy referred to therein by endorsement or otherwise when it was issued. There was nothing on the face of the policy that provided for the rebating of any premium. There was nothing on the face of the policy that suggested the agent’s commission was not going to be paid in full.

While the statute makes it illegal to do this, Sec. 40-1201 provides:

“POLICIES NOT CONFORMING TO STANDARDS.—No Company or agent shall issue or deliver in this state any policy which conflicts with any provision of this act. A policy issued in violation of this act shall be held valid and shall be *construed as provided in this act, and when any provision in a policy is in conflict with any provision of this act, the rights, duties and obligations of the company and policyholder and the beneficiary shall be governed by the provisions of this act.*”

Therefore the entire set up, from start to finish, was illegal. Nobody knew it better than the defendant companies. They were the moving spirits acting to set up such a scheme. The government, however, provided that it should be used in states prohibiting such things, but the defendant company proceeded to use it

anyhow, knowing without any question what it was doing. It is no wonder that the Court said "in a proper action it might be said that the war rating plan, on insurance involved in this action, as was written, was not permissible under the statutes of Idaho."

In other words, the Court has found definitely, in its opinion, that the plan could not be operated in Idaho and certainly, the defendant companies have endeavored, in our analysis, to evade the laws of the State of Idaho, coming in on the flimsy excuse that some years before they notified Ware they would pay him \$5.00 for a small amount of counter-signing and when it was pleaded that this was out-of-state business not covered by his contract and when the testimony of Peterson shows that and they failed to produce the man who wrote the letter and testify otherwise, it should be taken as conclusive that that agreement has nothing to do with the case. If it is a fact and it was intended to act without commissions, then it is void as against public policy and should be disregarded.

With this out of the order to the findings of the Court, which is unquestionably the rule that this policy was not permitted, then this company which has gone to all of the pains it has getting the plan set up to evade the laws of the United States and of the State of Idaho, should be required to pay the commissions provided for by law on the full standard premium covered by the policy.

With all the numerous decisions, including that of *Osburn v. Ozlin* and of *Homes v. Insurance Company* and of all the later cases, they were fully advised what the courts had held, neither they nor anyone else was justified to try to set up a scheme to evade the laws and escape the payment which the law requires them to make if they are to carry on in Idaho.

RETROSPECTIVE RATING

Something has been said about Retrospective Rating being new. Of course, that is not the fact. Retrospective or rating based upon what actually happened on a certain job is almost as old as the insurance itself. In fact, it is so well known that apparently the learned Judge who originally decided *Osborn v. Ozlin* took judicial notice of it and had no difficulty in holding that very often it was used simply as a method in evading the statute.

Osborn v. Ozlin 29 Fed. Supp. 71 on page 76, he said:

“The controlling reason, however, for the out-of-state production of hotchpotch of master policies covering persons or property in Virginia is the lower rate obtained for Virginia risks. *This result is accomplished by some form of special rating*, e. g. ‘retrospective rating,’ whereby the premium is retroactively reduced or increased, according to the favorable or unfavorable experience of the risk, ‘experience rating,’ which is based upon the application of an inflexible formula to the history of the losses of the assured, or ‘equity rating,’ which involves some flexibility of judgment in the formulation of rates lower than those developed by a fixed formula, and usually includes some reduction in the amount of the producer’s commission. Reduction in the cost of the insurance of a large corporation is sometimes secured by inviting the brokers to make competitive bids. The broker usually gets the business who offers the best price, *and he frequently contributes to this result by reducing the customary commission.*”

We think nothing could be more fitting to the case at bar than this, as here they attempt to avoid the statutes of the State of Idaho requiring the payment of commission entirely, by simply annulling commission after having appointed Ware the agent to counter-sign these policies, and reading the statute into them, agreeing to pay him 10% on workmen's compensation—and the contract at no time or place provides any other or different rate of commission on workmen's compensation than 10%.

The reading of the decision by the Trial Judge of *Osborn v. Ozlin* is very illuminating as showing that the same type of contention was back of all of that case as involved here. The learned Trial Judge found in substance, that all of these matters were nothing but schemes to evade the law and that they were not valid.

STATUTE ENACTED FOR BENEFIT OF CLASS
GIVES CAUSE OF ACTION FOR FAILURE
TO COMPLY THEREWITH

In this case the statute providing for full commissions to the counter-signing agent was for his benefit as well as a protection to the public, and gives him the right to maintain an action thereon.

Willy v. Mulledy, 34 Am. Rep. 536, was where the statute required fire escapes. The tenant brought the action. The Court said:

“In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.”

Wolf v. Smith, 9 L. R. A. (N. S.) 338 is a brief on this question and directly in point. No remedy was provided but the Court said:

“Neither does the statute provide a remedy for a failure to comply with its terms, *but this presents no obstacle to recovery in a proper case against the wrongdoer*. The common law affords the remedy, and, if the plaintiff has a cause of action, the proper remedy has been resorted to in this instance.”

Queen v. Dayton Coal & Iron Co., 30 L. R. A. 82, where the Court said:

“The requirement of fire escapes was for the direct and special benefit of the operators in such

factories, and intended for their protection and the rule applies that when a statute commands or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage, or for a wrong done to him contrary to its terms.”

The following cases fully sustain the rule:

Williams v. Travelers Ins. Co. 169 N. W. 609;
Credit Men's Adjustment Co. v. Vickery, 161
Pac. 297;

Great Western Mach. Co. v. Smith, 124 Pac.
414;

First National Bank v. Weidenbeck, 97 Fed.
863, C. C. A.;

Davis v. Mills, 99 Fed. 39;

Huntington v. Atrill, 146 U. S. 676, 36 L. Ed.
1131;

Robinson v. Harmon, 122 N. W. 106.

If this was not true then the Courts have been deciding most questions and all of the cases requiring the statutes complied with and the commissions paid were rendered under a mistake. It would have been idle in *Osborn v. Ozlin* for the Supreme Court to hold that commission had to be paid if the party entitled to the commission could not collect it.

The Court was doing a futile thing in *Holmes v. Insurance Co.* in sustaining the Attorney General's position that the full commission meant the amount

the agent would have secured had he himself written the policy, and the decision was hollow mockery if the agent could not collect. The whole theory of the law is that the agent has that full commission coming to him and is entitled to it, and being so, the statute was designed for his protection and his benefit and he is entitled to enforce it.

Most of the questions involved in this appeal are so closely connected that it is hard to draw a definite line where the argument and law on one ceases and another commences, as most of them are dependant on each other. The principal points decided by the Court are that the letter written to Ware to pay him \$5.00 per month for a small amount of counter-signing, evades the public policy of Idaho and although illegal, as construed by Defendants, can be set up by them as a defense, although Ware never received any sum from them whatever after the policies were signed and that the statute is void and a nullity because the term full commission does not mean anything and gives no basis for recovery.

In conclusion we respectfully submit:

I.

That the letter Defendants' Exhibit 1 to Answer and Exhibit 7 in Evidence, does not apply to anything in this case. It refers only to a small amount of counter-signing, which we alleged in our reply, Par. III, P. 53 and 54, and the Defendants witness Peterson

testified too, was, out-of-state business P. 164. If construed in the manner now contended for by Defendants it would mean it was a subterfuge to evade and set aside the public policy of the State of Idaho and under the decision of the trial judge the agency contracts “become public policies of the State and *cannot be departed from by the parties*. I agree that *they cannot be waived, and that the public policies cannot be departed from.*”

This being so, the Defendant cannot set up this alleged agreement as a defense or rely thereon again. Ware is dead, and they had a witness who wrote this very ambiguous letter and did not produce him or elucidate any explanation from him in regard thereto. Being ambiguous, and a unilateral writing, and not a negotiated contract, it will be construed strictly against the Defendants as they drew it. Certainly under these rules they cannot under any circumstances be heard to ask such a construction, and if it is so construed it makes the agreement illegal and void, and it being a special defense brought into the case by them, they cannot use the same for any purpose, much less a defense in this case.

II.

As to the notice sent out by the Defendants, Exhibit A2 to the Complaint, it is clear that the sentence, “*on risks or portions of risks which are in states other than that indicated in the territory described in your Agency Agreement,*” was written because of the then recently

decided case of *Osborn v. Ozlin* holding that the counter-signing agent was entitled to his commission, and sustaining state statutes so providing, in a sweeping way, would require the Defendants to pay a double commission, and this is also amplified by the fact that it also provides, “and on Bonds *involving execution or counter-signature by another agent*,” shows beyond a doubt that it was intended to protect themselves against this contingency and nothing else. If this was not its purpose, then these sentences in the notice were worse than useless. It again comes under the same rule of construction as the former letter just referred to, and under no reasonable construction can be held to apply otherwise than as contended for by the Plaintiff.

III.

As to the term “full commission,” it is clear that what the legislature had in mind was that the agent got all the commission without reduction of any kind. The legislatures of half a dozen states having used the same term, it would seem to be rather presumptuous to say they did not know what it meant. The witness, Nelson, an experienced insurance agent, testified what it meant, and there was no dispute on that. But that is not all. The Attorney General of Montana rendered his opinion that it means exactly what we claim. The insurance company set up his opinion in full in their petition to enjoin the Auditor from enforcing it; that is it gave no right and was so indefinite it could not be enforced. The case went to the United States Supreme Court and they had no difficulty in understand-

ing it, and reversed the decision of a three-judge court holding in favor of the Insurance Company. On the first appeal in this case, if that statute did not give a measure for relief, we had no case and this Court must have held that it did, as counsel for appellee devoted many pages of their brief (pages 23 to 27) so contending, but this Court sustained the Complaint. The Court in his opinion admits the statute should be read into the contract. If such is done, the contract provides Ware was to get 10% on Workmen's Compensation cases which establishes the "full commission." The contract further provides Ware was to countersign policies for Defendants; Par. 8 P. 19. Now making the statute a part of that contract to countersign, it makes the provision that in Idaho policies, and those placed or written in Idaho, Ware was to get the "full commission." We think this is clear and as the Supreme Court of the United States undoubtedly took this position in *Holmes v. Springfield Ins. Co.* it would seem nothing further could be or is needed to be said on the question.

IV.

The so-called War Rating Plan was by its very terms, as well as the law of Idaho, not permitted in this State. The plan provides in substance that where it is not permitted, by the laws of a state, it shall not be used. The plan was built on the proposition that no agents' commission should be paid. The Idaho statute provides all policies on persons or property in Idaho shall be countersigned by an Idaho agent, and the full

commission paid to him, so therefore the plan was prohibited by the Idaho statute, and the trial Judge in substance so found. P. 75:

“In a proper action it might be said that the war rating plan, under which the insurance involved in this action was written, was not permissible under the Statute of Idaho.”

Again P. 86, last part of Findings VI, it says:

“The Court makes no finding as to whether this plan was permissible under the laws of the State of Idaho.”

But that is not all. Peterson, the secretary of the defendants testified he helped set up the plan, with some four or five other large insurance firms, and that the object of the plan was to get away from or evade the law of Congress, which requires the letting of the matter to the lowest bidder. We suppose he referred to Sec. 5, Title 41; Sec. 1333, Title 10; and Secs. 561-571, Title 34, all U. S. C. A.

And then again, the policy itself did not mention this so-called War Rating Plan and had nothing on it referring to any such endorsement. The plan provided for eliminating commissions to get the business and rebating a large portion of the premiums. This is strictly prohibited by the laws of Idaho and such a policy is void under the statute of this state under such circumstances, and then it is construed as to all parties according to the statute without regard to the policy contract, so from the start this policy and all the ac-

tions of the Defendants have been one continuous scheme and attempt to evade and avoid the statutes of Idaho. When public policy of the State of Idaho is provided for its statutes and the Defendants attempt to construe a contract so as to nullify, it is illegal and void. Further than that, they wrote these unilateral notices, did not produce the witness who wrote it, and the rule of construction is that it will be construed against them not only as to it being the person who failed to put what they claim the writing was intended to mean in the writing, but they failed to produce the witness who could have explained it and, being worse than ambiguous, if construed the way they contend for they will not be given the benefit of the doubt, but it will be resolved in favor of the appellants.

V.

The statute having been enacted for the purpose of compelling payment of the premiums to the agent who countersigns the policy on property, persons and risks within the State, will be construed by the Court to carry out this intention and having been enacted for the benefit of counter-signing agents they are entitled to base their action thereon and recover in accordance therewith.

In conclusion we respectfully submit that whatever difficulty the Defendants have gotten themselves into in this case, it has been of their own making in attempting to circumvent the statutes of the United States in attempting to nullify a statute of the State of Idaho

and as to their condition, the Court will leave them where it finds them and as the Plaintiff has been in no manner responsible for any of these acts, it should be given the benefit of the doubt enacted for their benefit and the Judgment of the Lower Court should be reversed.

Respectfully submitted,

EZRA R. WHITLA,

E. T. KNUDSON,

Attorneys for Plaintiff and Appellant.

Residence and P. O. Address:

Coeur d'Alene, Idaho.

**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARY BRODERICK, Administratrix with the will annexed of the Estate of Eugene H. Ware, deceased,
Appellant,

VS.

THE TRAVELERS INSURANCE COMPANY, a corporation,
and THE TRAVELERS INDEMNITY COMPANY, a corporation,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF IDAHO, NORTHERN DIVISION

BRIEF FOR THE APPELLEES

CHARLES HOROWITZ,
WM. S. HAWKINS,
Attorneys for Appellees.

PRESTON, THORGRIMSON & HOROWITZ,
Of Counsel,
2000 Northern Life Tower,
Seattle 4, Washington.

FILED

OCT 24 1946

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY BRODERICK, Administratrix with the will annexed of the Estate of Eugene H. Ware, deceased,
Appellant,

vs.

THE TRAVELERS INSURANCE COMPANY, a corporation,
and THE TRAVELERS INDEMNITY COMPANY, a corporation,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES, DISTRICT OF IDAHO, NORTHERN DIVISION

BRIEF FOR THE APPELLEES

CHARLES HOROWITZ,
WM. S. HAWKINS,
Attorneys for Appellees.

PRESTON, THORGRIMSON & HOROWITZ,
Of Counsel,
2000 Northern Life Tower,
Seattle 4, Washington.

SUBJECT INDEX

	<i>Page</i>
Statement of the Case.....	1
Outline of Argument.....	8
Argument	11
1. There is no right of recovery for the counter- signing services rendered by Eugene H. Ware under the provisions of the agency contract dated October 1, 1936, as amended, because	
(a) Eugene H. Ware did not secure the propo- sals for the insurance involved	11
(b) The commissions stipulated in Exhibit A were not applicable under the conditions stated in Exhibit A-2.....	11
(c) There is no proof that a special commission for Eugene H. Ware was fixed for the in- surance here involved within the meaning of Exhibit A-2	12
(d) Agency Contract—Exhibit A—Contained no provision for the payment of any commis- sion for countersigning services	13
2. There is no right of recovery for the counter- signing services rendered by Eugene H. Ware under the provisions of the supplementary \$5.00 per month contract dated October 21, 1936 (Ex- hibit 1, R. 50-51)	14
3. Sec. 40-905 I.C.A., prior to the July 1, 1947, amendment, authorized countersigning services to be rendered for compensation by way of sal- ary or for no compensation if the insurance com- pany and the agent so agreed	15
4. The plaintiff is not entitled to commission for countersigning services rendered, by virtue of the provisions of Sec. 40-902 I.C.A. as amended by Chapter 61, Idaho Session Laws of 1939	16
(a) The meaning of the phrase “the full com- mission” in Sec. 40-902.....	16
(1) The phrase “the full commission” means “full commission, if any”	16

(2) Section 40-902 does not prohibit the countersigning agent from sharing the commission with another or from making any arrangements in relation thereto which are satisfactory to him.....	23
(3) The 5% provision inapplicable.....	24
(b) The defendants did not "make, write, place, or cause to be made, written or placed in this state" any policy or bond here involved so as to entitle plaintiff to commissions if any were payable, even though the policies were on "property * * * located in this state"	26
(1) Preliminary Statement	26
General comments as to the history of the statute	27
(2) The words "made, written or placed in this state" contained in Section 40-902 show that the section does not apply to the policies and bond issued to the Walter Butler Company, because they were negotiated and written outside of Idaho	28
(c) The wording and meaning of the Idaho Statute as contrasted with the wording and meaning of the Montana and Virginia countersignature statutes, showing that the Idaho statute is clearly different and distinguishable	31
(d) The statute (Sec. 40-902) is not to be read into the plaintiff's contract as a part thereof, so as to confer a cause of action in favor of plaintiff against the defendants	41
5. The defense of waiver of commissions by contract	44
6. The Idaho resident agency statute involved (Sec. 40-902) if construed in accordance with the plaintiff's contentions, violates the United States Constitution and is, therefore, invalid	48
(a) The constitutional questions are still in the case	48

(b) The statute conflicts with the XIVth Amendment	49
(c) The statute conflicts with the commerce clause of the United States Constitution	55
7. Reply to appellant's brief	64
(a) Criticism of appellant's statement of the case	64
(b) Contentions considered	69
1. The contention that salaried agents are prohibited by Idaho Statute	69
2. The contention that all questions have been resolved in plaintiff's favor by the case of <i>Ware v. Travelers Ins. Co.</i> , 150 F.(2d) 463	70
3. The contention that the contract of October 1, 1936, fixes the rate of recoverable commission	70
4. The contention that "full commission" means the commission payable if the insurance was procured by Ware and written without the War Projects Insurance Rating Plan	72
5. The contention that the War Projects Insurance Rating Plan was inapplicable and illegal	74
(1) Background and development of War Projects Insurance Rating Plan.....	76
(2) Legality of the War Projects Insurance Rating Plan in Idaho.....	81
A. The United States Navy required the use of the Plan on this project	81
B. There is nothing in the laws of Idaho governing casualty insurance premiums or bond premiums or governing commissions payable on casualty insurance or requiring that any percentages of premium be paid to anyone for any services either in the production of or the counter-signature of casualty insurance covering risks in Idaho	82

	<i>Page</i>
C. Section 40-905 of the Idaho Insurance Code does not require that an agent be paid any commission	83
D. Use of the War Projects Insurance Rating Plan is entirely consistent with the requirements of §40-902 of the Idaho Insurance Code	83
(1) Section 40-902 has no application to insurance policies made, written and placed outside of Idaho.....	83
(a) The statute does not stipulate that any specified percentage or amount shall be paid to any agent or broker for the production of the business or for the countersignature of the policies	84
(b) Agents and brokers on the one hand and insurance carriers on the other are entirely free, under the Idaho Insurance Code, to make any contracts or agreements mutually acceptable to them for the services performed	84
(c) There is nothing in §40-902 which requires that a countersigning agent shall keep any specified amount of commission even when a commission is in fact paid by the carrier for the business. The countersigning agent is entirely free under the statute to remit the entire commission or any part thereof in accordance with any agreement which he may make with the carrier or the producing agent or broker..	84
E. Section 40-1107 of the Idaho Insurance Code does not prohibit use of the War Projects Insurance Rating Plan	85
1. Rebating not involved in use of the War Projects Insurance Rating Plan	85
2. There was no "rebate of or part of the premium payable on the policy or on any	

SUBJECT INDEX

vii

Page

policy or of the agent's commission thereon" within the meaning of the first part of §40-1107	87
3. The War Projects Insurance Rating Plan was not used as an inducement to insurance	88
4. Prohibition of allowance "* * * which is not specified, promised or provided for in the policy contract of insurance; * * * nor except as specified in the policy contract"	90
6. The contention that the \$5 per month contract is void as against public policy.....	93
7. The contention that the plaintiff has a direct cause of action under the statute for commissions	93
Conclusion	94
Appendix	following page 95

CASES CITED

<i>Aetna L. Ins. Co. v. Dunken</i> , 266 U.S. 389, 69 L. ed. 342, 45 S. Ct. 129	53
<i>Aetna Life Co. v. Moser</i> , 189 Wash. 521, 65 P.(2d) 1277	75
<i>Allgeyer v. Louisiana</i> , 165 U.S. 578, 41 L. ed. 832, 17 S. Ct. 427	53
<i>American Surety Co. of N. Y. v. Bankers' Savings & Loan Assn. of Omaha, Neb.</i> (C.C.A. 8) 67 F. (2d) 803	49
<i>Averill v. Northwestern Natl. Ins. Co. of Milwaukee</i> (Wis.) 284 U.S. 590, 76 L. ed. 509, 52 S. Ct. 139	52, 58
<i>Baldwin v. Seelig, Inc.</i> , 294 U.S. 511, 55 S. Ct. 497	59
<i>Best & Co., Inc. v. City of Omaha</i> (Neb.) 33 N.W. (2d) 150, decided June 29, 1948	59
<i>Best & Co., Inc. v. Maxwell</i> , 311 U.S. 454, 61 S. Ct. 334	57
<i>Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co.</i> (Pa.) 190 Atl. 924.....	13, 18, 21, 43, 46, 93

<i>Boseman v. Connecticut General L. Ins. Co.</i> , 301 U.S. 196, 81 L. ed. 1036, 57 S. Ct. 686, 110 A.L.R. 732	53
<i>Broderick v. Travelers Ins. Co., et al.</i> , 73 F. Supp. 354	7
<i>Commissioner of Internal Revenue v. Bradley</i> (C. C.A. 6) 56 F.(2d) 728	75
<i>Edwards v. California</i> , 314 U.S. 160, 62 S. Ct. 164	61
<i>Evers v. Davis</i> (N. J.) 90 Atl. 677	43
<i>Fidelity and Deposit Co. of Maryland v. Tafoya</i> , 270 U.S. 426, 70 L. ed. 664, 46 S. Ct. 331..53, 54,	55
<i>Flynn v. The Canton Company</i> , 40 Md. 312, 17 Am. Rep. 603	43
<i>Freeman v. Hewitt</i> , 329 U.S. 249, 91 L. ed. 265, 67 S. Ct. 274.....	48, 61
<i>Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.</i> , 292 U.S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928	53
<i>Hartford Life Ins. Co. v. Blincoe</i> , 255 U.S. 129, 41 S. Ct. 276	49
<i>Hartford Steam Boiler Inspection & Ins. Co. et al. v. Harrison</i> , 301 U.S. 459	20
<i>Hitson v. Dwyer</i> (Cal.) 143 P.(2d) 952	43
<i>Holmes v. Springfield Fire and Marine Ins. Co.</i> , 311 U.S. 726, 85 L. ed. 473, 61 S. Ct. 129	31, 35, 53, 55, 73
<i>Home Ins. Co. v. Dick</i> , 281 U.S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701	53
<i>Hyatt, State Ins. Com'r. v. Blackwell Lumber Co.</i> , 31 Ida. 452, 173 Pac. 1083 (1918).....	28, 29, 52, 53
<i>Independent Indemnity Co. v. Dreyfus</i> (C.C.A. 6) 49 F.(2d) 599	75
<i>Lawson v. Black Diamond Coal Mining Company</i> , 53 Wash. 614, 102 Pac. 759	74
<i>Liggett Co. v. Baldrige</i> , 278 U.S. 105, 73 L. ed. 204, 49 S. Ct. 57	52
<i>MacGregor v. Persha</i> (Minn.) 218 N.W. 463	74

<i>Mayer v. State of Nebraska</i> , 262 U.S. 390, 43 S. Ct. 625	64
<i>Messinger v. Anderson</i> , 225 U.S. 436, 32 S. Ct. 739	49
<i>Mitchell v. Reolds Farms Co.</i> (Mich.) 247 N.W. 89	49
<i>Morgan v. Commonwealth of Virginia</i> , 328 U.S. 373, 90 L. ed. 982, 66 S. Ct. 1050 (1946)	61
<i>National Union Fire Ins. Co. v. Nevils</i> (Mo.) 274 S.W. 503	75
<i>New York L. Ins. Co. v. Head</i> , 234 U.S. 149, 58 L. ed. 1259, 34 S. Ct. 879	53
<i>Nippert v. Richmond</i> , 326 U.S. 416, 66 S. Ct. 584 (1946)	60
<i>Northwestern Natl. Ins. Co. of Milwaukee, Wis. v. Lee</i> , 49 F.(2d) 274	52, 53, 58
<i>O'Gorman & Young v. Hartford Fire Insurance Company</i> , 282 U.S. 251, 75 L. ed. 324, 328	55
<i>Osborn v. Ozlin</i> , 310 U.S. 53, 84 L. ed. 1074, 60 S. Ct. 758	31, 39, 53, 55
<i>Osborn v. Ozlin</i> , 27 F. Supp. 71	69, 70
<i>Pacific American Fisheries v. Hoof</i> (C.C.A. 9) 291 Fed. 306	49
<i>Potomac Fire Insurance Company v. State</i> (Tex.) 18 S.W.(2d) 929	29, 55
<i>Prudential Ins. Co. v. Benjamin</i> , 328 U.S. 408, 90 L. ed. 1023, 66 S. Ct. 1142	48, 56
<i>Robertson v. People of the State of California</i> , 328 U.S. 440, 90 L. ed. 1040, 66 S. Ct. 1160	48, 49, 52, 56, 63, 64
<i>Smith v. Kleinschmidt</i> (Mont.) 187 Pac. 894	87
<i>Southern Pac. Co. v. State of Arizona</i> , 325 U.S. 761, 65 S. Ct. 1515	60
<i>Springfield Fire and Marine Ins. Co. v. Holmes</i> , 32 F. Supp. 964	22, 72, 84
<i>Taylor v. L.S. & M.S.R. Co.</i> , 7 N.W. 728	43
<i>Union Mut. Casualty Co. v. Insurance Budget Plan, Inc.</i> (Mass.) 195 N.E. 903	75
<i>United Pacific Co. v. Bakes</i> (Ida.) 67 P.(2d) 1024	28

<i>U. S. v. S. E. Underwriters Assn.</i> , 322 U.S. 533, 64 S. Ct. 1162, 88 L. ed. 1440	55
<i>Ware v. The Travelers Ins. Co.</i> , 150 F.(2d) 463.....9-10, 48, 49, 55, 62, 70, 94	

TEXTBOOKS

11 Am. Jur. 646, §§40 et seq.	52
11 Am. Jur. 995, §§261, 262, 263	52
12 Am. Jur. 134, §472	52
23 Am. Jur. 230, §§259, 265, 275	52
29 Am. Jur. 330	85
2 Cooley's Constitutional Limitations, 8th ed., 1229 1236-7	52 64
3 C.J.S. 69, §176	13
Couch, Cyclopedia of Insurance Law, Vol 3, 1872 §584	86
Haugh, "The Comprehensive Insurance Rating Plan," Vol. XXVIII, Part II, No. 58, Proceed- ings of the Casualty Actuarial Society	89
Kulp, Casualty Insurance, 173	17

STATUTES AND CODES

Iowa Insurance Code, 1935, as amended by 1939 Session Laws, Ch. 28 S.F. 164, §6	41
Idaho Code Annotated:	
§40-508	62
§40-708	40
§40-711	40
§40-712	40
§40-803	30
§40-804	30, 39
§40-807	42
§40-809	28, 39
§40-901	31
§40-902, as amended by Ch. 61, Idaho Session Laws, 1939..2, 6, 8, 9, 10, 16, 18, 20, 23, 26, 27, 28, 29, 30, 31, 35, 36, 37, 39, 41, 46, 48, 49, 50, 52, 54, 55, 57, 62, 63, 64, 70, 72, 83, 84.	

Idaho Code Annotated:

§40-903	41, 42, 62
§40-905	15, 16, 17, 36, 70, 83
§40-906	39
§40-1002	24
§40-1107.....	39, 85, 87, 88, 92
§40-1501	30
§43-1601	40, 62
§43-1604	62
§43-1605	62
§43-1606	62
§65-510	25
Laws of Idaho 1901, p. 138 (H.B. 73).....	29
1911, Ch. 228.....	42
1913, Ch. 185.....	29
1915, Ch. 145.....	28, 50
1921, Ch. 1943.....	30
1932, Ch. 15	35
1943, Ch. 172.....	25
1945, Ch. 145.....	28
Laws of Virginia, §4222.....	69
§4226a	84
McCarran Act	55

CONSTITUTION

United States Constitution:

Art. VI, Clause 2.....	52
XIVth Amendment.....	9, 20, 48, 49, 52, 64

RULES

Rules of Civil Procedure, Rule 52(a).....	11
---	----

INDEX TO APPENDIX

Appendix
Page

CASES CITED

<i>Springfield Fire & Marine Ins. Co. v. Holmes</i> , 32 F. Supp. 964	10
<i>Ware v. Travelers Ins. Co. et al.</i> , 150 F.(2d) 463	1

STATUTES AND CODES

Idaho Code Annotated:

§40-508	22
§40-708	16
§40-711	16
§40-712	17
§40-803	4
§40-804	5
§40-807	21
§40-809	4, 12
§40-901 (Before Laws of Idaho 1947, Ch. 258)	5
§40-901 (Laws of Idaho 1947, Ch. 258)	6
§40-902 (Before Laws of Idaho 1947, Ch. 258)	5
§40-902	1
§40-903	20
§40-906	11
§40-1002	2
§40-1107	13
§40-1501	2
§43-1601	17
§43-1604	23
§43-1605	23
§43-1606	24
§65-510	3
Laws of Idaho 1915, ch. 145, p. 318	3
Montana Laws §1	10
Pennsylvania Statute	22
Virginia Code §4222(a)	8
§4426-a	9

RULES

Rules of Civil Procedure, Rule 52(a)	2
--	---

**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARY BRODERICK, Administratrix with
the will annexed of the Estate of Eu-
gene H. Ware, deceased, *Appellant,*

vs.

THE TRAVELERS INSURANCE COMPANY, a
corporation, and THE TRAVELERS IN-
DEMNITY COMPANY, a corporation,
 Appellees.

No. 11901

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES, DISTRICT OF IDAHO, NORTHERN DIVISION

BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

Appellees, (defendants below) being dissatisfied with the appellant's statement of the case, present the following summary:

This suit was originally instituted by an insurance agent, Eugene H. Ware, a resident of Coeur d'Alene, Idaho, claiming to recover substantial commissions from the appellees, insurance companies of Hartford, Connecticut, solely because said Ware countersigned certain policies of insurance issued by the defendants outside the State of Idaho and not negotiated, solicited or procured within the State of Idaho or by the said Ware.

The defendants' motion to dismiss the complaint was originally granted by the court below on the ground that the statute, Sec. 40-902 I.C.A., as amended by Chapter 61, Idaho Session Laws, 1939, relied on by the plaintiff, was unconstitutional. On appeal, judgment of dismissal was reversed, this court upholding the *prima facie* constitutionality of the statute, but deferring a ruling upon a number of other local law questions in the case (App. 1).

After remand, issues were made up on the basis of the defendants' answer (R. 35), plaintiff's reply (R. 51) and trial amendment to answer (R. 55) expressly again raising the question of the constitutionality of the statute involved relied on by plaintiff.

Eugene H. Ware (now appearing by plaintiff as administratrix) was a resident and citizen of Coeur d'Alene, Idaho, and since January 1, 1936, a duly licensed insurance agent under Idaho law. The defendants were and are Connecticut insurance companies lawfully doing business in Idaho, conducting their business jointly and substantially as one. The amount in controversy exceeds \$3,000, exclusive of interest and costs.

On October 1, 1936, Ware and defendants entered into a written agency contract (R. 16-21). That contract was amended on a number of occasions (Exh. A-1 through A-9 inclusive, R. 22-31). This contract stated that the territory within which Ware might act was Coeur d'Alene and vicinity, Idaho; provided for the payment of commissions "on proposals secured by or through the agent, as full compensation for all services and full reimbursement for all expenditures;"

authorized the countersigning of policies pertaining to the lines of insurance covered by the contract; and contained other conditions and stipulations with respect to Ware's contract as an agent. The amendment contained in Exh. A-2 (R. 23) made the commission rates stipulated in Exh. A inapplicable under certain conditions. About October 21, 1936, the said Ware and defendants entered into a valid supplemental agreement by which defendants agreed to pay Ware and said Ware agreed to accept a monthly remuneration of \$5 for countersigning insurance policies issued by defendants on Idaho risks in the case of proposals for insurance secured outside the state and not secured by Eugene H. Ware (Ex. 7, 22, R. 50, 120, 162). Later, defendant, Travelers Indemnity Company, appointed attorneys-in-fact, including said Ware, for the execution of bonds (R. 31). Thereafter, the parties entered into the performance of the aforesaid contracts, the said Ware countersigning policies and receiving payment therefor as per contracts aforesaid.

In May, 1942, the defendants made, wrote and placed in the State of New York, through Acme Brokerage Corporation, insurance advisor of the Walter Butler Company, three insurance policies (including Workmen's Compensation) required by the U. S. Navy in connection with and covering the construction by the Walter Butler Company (under a cost-plus-a-fixed-fee contract it had with the U. S. Navy) of the Faragut Naval Station at or near Bay View, Idaho (R. 82). The insurance coverage required under that construction contract was under the jurisdiction of

the Bureau of Yards and Docks of the United States Navy (R. 80). That Bureau required the insurance to be issued under the Comprehensive Insurance Rating Plan for National Defense Projects, later designated as War Projects Insurance Rating Plan. The War Projects Insurance Rating Plan was a form of retrospective rating under the terms of which the final premiums for the three policies were determined after operations were completed, upon the basis of certain fixed charges and the composite losses developed under the three policies. The premium contained no provision for profit to the insurance carrier (R. 81) and contained no provision for payment of commission to a procuring agent (R. 82). Deposit premiums and interim payments were made to the defendants in accordance with the provisions of the rating plan. The detailed nature and reasons for the plan will be more fully developed hereinafter. The final earned premium for the three policies computed in accordance with the terms of the rating plans was \$246,127.56 resulting in a net saving to the U. S. during wartime over what would otherwise have been payable of the difference between a standard premium of \$1,294,608.42 and the earned premium of \$246,127.56 or \$1,048,480.86 (R. 84-5).

Later, in February, 1943, two additional policies were issued on a standard premium basis covering certain liability in connection with the Bozanta Tavern located near Hayden Lake, Idaho. The earned premiums on these policies were slightly over \$100 and were paid to defendants through Acme Brokerage Corporation of New York, who placed such insurance business with the defendants in New York (R. 87).

As to the first three policies, written under Comprehensive Insurance Rating Plan, and, therefore, written on a retrospective basis, no commission was payable to Ware because (1) he did not procure the business, and (2) no commission was fixed as payable to Ware, as was required under the terms of the Exhibit A-2 amendment to his agency contract (R. 23) if Ware was to receive any commission on risks written on a retrospective basis. Furthermore (R. 165), no commission was paid to anyone by the appellees in connection with the procuring of said business. Those policies were made, written and placed in New York City and were not submitted to Ware by any licensed broker.

As to the rate of commission ordinarily paid, the court found from the evidence that the rate in Idaho is customarily fixed by contract between the insurance carrier and the insurance agent on terms mutually satisfactory to each. There was no evidence as to any customary rate of commission in the case of policies written on a retrospective basis or under the Comprehensive Insurance Rating Plan. Furthermore, evidence offered on behalf of plaintiff (R. 111) was that the rate of commission varied with the size of the policy or risk, the rate going down as the size of the risk goes up; and that even such rate varied with the various companies.

Eugene H. Ware countersigned each of the first three policies and indemnity bonds in connection therewith and later countersigned the two Bozanta Tavern policies. Ware's services were confined to the simple, formal act of countersigning the policies and bond and

mailing the policies to New York and the bonds to the Industrial Accident Board of Idaho (R. 86). The evidence involved showed that Ware had nothing whatsoever to do with the servicing of the policies involved, they being handled independently (R. 232, *et seq.*).

The countersigning services rendered by Ware were rendered under and pursuant to the countersigning authority provided for in the agency contract dated October 1, 1936, (Exh. A, R. 19) and under and pursuant to the supplemental contract of October 21, 1936, in which said Ware agreed to accept a monthly remuneration of \$5.00 for such countersigning services. The court found that Eugene H. Ware had been paid in full by the defendants for such countersigning services (R. 76, 88, 91).

Section 40-902 of the Idaho Code Annotated as amended by Chapter 61, Laws of 1939, page 109, was in effect when the countersigning services were rendered (R. 88, App. 1).

The court found from the evidence that when the countersigning services were rendered, defendants were foreign insurance companies licensed to do business in Idaho and engaged in interstate commerce both with respect to the making, writing and placing of insurance policies and the servicing thereof; and that the making, writing and placing of insurance policies and instruments involved were in the course of and constituted an act of interstate commerce (R. 89).

The court found that under Idaho law no service whatsoever is required of a countersigning agent except the simple, ministerial act of countersignature

(R. 86, 89); and that such service of a countersigning agent is required only in the case of policies issued on Idaho risks by foreign insurance companies and that no such requirement exists as to domestic companies (R. 90). In that connection, the court found that at the time in question there existed in active business and in active competition with the defendants, the Idaho Compensation Company, a domestic insurance company of Idaho, and that the countersignature statute involved did not apply to such company (R. 90).

The court then held that the Idaho statute aforesaid was constitutional under the doctrine of the law of the case; that the statute contains no provision fixing the amount of commission that should be paid to Ware for countersigning services rendered by him; that no provision of the statute applied to the facts in this case so as to permit recovery; that customary commissions, if any, paid on insurance proposals secured in Idaho by Idaho agents form no basis for awarding commissions to the plaintiff in this case; that the plaintiff had been paid for countersigning services rendered under Ware's agreement to accept \$5 per month therefor; and that the defendants were entitled to judgment of dismissal and costs (R. 91).

Broderick v. Travelers Ins. Co. et al., 73 F. Supp. 354.

These local law questions having been now decided, this Court now has the "benefit of the contribution which the Federal Judge in Idaho is in a position to make." *Unless this contribution is clearly erroneous it should be accepted.*

Plaintiff concedes that the facts involved are largely undisputed, (Ap. Br. 18); and his Specifications of Error (Ap. Br. 20) (which are narrower than his Statement of Points (R. 267, *et seq.*)) are apparently not based on want of evidence to support the findings of fact, but are based rather on a disagreement with the application or validity of the legal principles applied to the admitted facts (Ap. Br. 20).

We proceed now with argument in support of the judgment of dismissal below. Such additional statement of facts will be made as may be necessary in connection therewith.

OUTLINE OF ARGUMENT

1. There is no right of recovery for the countersigning services rendered by Eugene H. Ware under the provisions of the October 1, 1936, Agency Contract as amended because; (a) Eugene H. Ware did not secure the proposals for the insurance involved; (b) the commissions stipulated in the contract were not applicable because of conditions stated in Exhibit A-2; (c) no commission was fixed for the insurance involved, as contemplated by Exhibit A-2; (d) the agency contract contained no provision for the payment of any commission for countersigning services.

2. There is no right of recovery for countersigning services rendered by Eugene H. Ware because of the provisions of the supplementary \$5 per month contract dated October 21, 1936.

3. The plaintiff is not entitled to commissions for countersigning services rendered by virtue of the provisions of Section 40-902 I. C. A. as amended by

Chapter 61, Idaho Session Laws of 1939 because (a) the phrase "the full commission" is applicable only if a commission is paid or payable. The 5% provision applicable to applications submitted by brokers is inapplicable here; (b) the defendants did not make, write or place or cause to be made, written or placed in Idaho any policy or bond here involved so as to otherwise render the statute applicable; (c) The Idaho Statute is clearly different and distinguishable from the Montana and Virginia Countersignature Statutes, and (d) the statute, Section 40-902, does not confer a cause of action in favor of the plaintiff against the defendants.

4. Ware waived any commissions otherwise recoverable by his contract of October 1, 1936, and supplementary \$5 per month contract of October 21, 1936.

5. The Idaho Resident Agency Statute involved (Section 40-902), if construed in accordance with the plaintiff's contentions, conflicts with the XIVth Amendment and the Commerce Clause being arbitrary and excessive for the protection of the local interest and discriminating on its face and in fact against interstate commerce. It is accordingly invalid and furnishes no basis for any recovery that might be claimed under the statute. The constitutional questions are still in the case.

6. Appellant's brief does not correctly and adequately state the facts, nor are appellant's contentions valid. In particular, appellants following contentions are invalid: (1) that salaried agents are prohibited by Idaho Statute; (2) that all questions have been resolved in the plaintiff's favor by the case of *Ware*

v. Travelers Insurance Co., 150 F.(2d) 463; (3) that the contract of October 1, 1936, fixes the rate of recoverable commission; (4) that the phrase "full commission" contained in Section 40-902 means the commission payable as if the insurance had been procured by Ware and was not written on a retrospective or special commission basis and was written without the War Projects Insurance Rating Plan; (5) that the War Projects Insurance Rating Plan is inapplicable and illegal; (6) that the supplementary contract of October 21, 1936, is void as against public policy, and (7) that the plaintiff has a direct cause of action under Section 40-902.

7. Conclusion. The district court, pursuant to the mandate of this court to determine the local law questions involved, having resolved all controlling issues in favor of appellees, and having entered judgment of dismissal, the district court's action should be affirmed.

ARGUMENT

(References hereinafter to a finding of the trial court will bear the letter "n" whenever such finding is not objected to in the respect discussed in Appellant's Specifications of Error (App. Br. 20-25). Findings will not, of course, be set aside even if objected to unless "clearly erroneous." Rule 52(a), Rules of Civil Procedure (App. 2). References to App. refer to appendix.

1. There is no right of recovery for the countersigning services rendered by Eugene H. Ware under the provisions of the agency contract dated October 1, 1936, as amended, because

(a) Eugene H. Ware did not secure the proposals for the insurance involved.

The Agency Contract (R. 16, par. 4) provides for the payment of stipulated commissions "on proposals secured by or through the agent as full compensation for all services and full reimbursement for all expenditures," the agent's territory being confined to Coeur d'Alene and vicinity, Idaho.

The trial court found (Finding VIII, n, R. 87): "That none of said policies was written pursuant to proposals secured by Eugene H. Ware." Accordingly, no compensation is payable to plaintiff by virtue of the agency contract.

(b) The commissions stipulated in Exhibit A were not applicable under the conditions stated in Exhibit A-2.

The basic agency contract, Exh. A. (R. 16-21) was amended effective June 1, 1940, by Exh. A-2 (R. 23) to provide

“on risks written on a Retrospective or Special Commission basis,

“on risks or portions of risks which are in states other than that indicated in the territory described in your Agency Agreement, and

“on Bonds involving execution or countersignature by another Agent (provided your Agency Agreement includes Surety Lines),

“the commissions which you may retain out of premiums paid to the Company will be fixed on the basis of the individual risk, anything in your Agency Agreement to the contrary notwithstanding.”

The commission rates stipulated in Exhibit A were thus abrogated under the conditions stated.

The trial court found (R. 81-85) on the basis of uncontradicted evidence (R. 133) that the first three policies involved (Compensation Policy WUB-863386, Liability Policy WSLG-863387 and Automobile Liability Policy WSLA-863388) were written on a retrospective basis in accordance with the War Projects Insurance Rating Plan.

(c) There is no proof that a special commission for Eugene H. Ware was fixed for the insurance here involved within the meaning of Exhibit A-2.

The court found (Finding VI, n, R. 86) :

“That no commission was fixed or payable as provided in Exh. A-2 of the contract attached to the complaint (dealing with the risks written on a retrospective basis) the individual risks involved calling for no payment of commissions under the terms of the aforesaid Comprehensive Insurance Rating Plan.”

To be entitled to any commission under the terms of

his agency contract, Ware had to produce the business. Had he produced this retrospective business, no commission would have been fixed for it because, under the terms of the Comprehensive Insurance Rating Plan, no commission was payable or was to be paid.

(d) Agency Contract — Exhibit A — Contained no provision for the payment of any commission for countersigning services.

Paragraph 8 of Exhibit A authorized Mr. Ware to countersign policies "pertaining to the lines of insurance covered by this contract." This countersigning authorization was broad enough to include policies for business not produced by Mr. Ware. It would have been entirely proper of course to have agreed with Ware that the commissions earned under the terms of Paragraph 4 of Exhibit A were to include some incidental countersigning of other policies with the authorization granted in Paragraph 8. As stated in *Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co.* (Pa.) 190 Atl. 924:

"There is no requirement of public policy preventing the parties from so grading the rates of commission on other types of business, that the return received therefrom would be sufficient to compensate the agency for countersigning home office policies as well."

No separate compensation being provided for countersigning services (such services being included in commissions payable on policies calling for such commission) plaintiff cannot recover under the Agency Contract for rendering such countersigning services.

2. There is no right of recovery for the countersigning services rendered by Eugene H. Ware under the provisions of the supplementary \$5.00 per month Contract dated October 21, 1936. (Exhibit 1, R. 50-51).

As previously stated it would have been entirely proper for the defendants to have agreed with Mr. Ware that the commissions which he earned under the terms of his agency contract were to include compensation to him for any countersigning which he did for the defendant companies of policies of insurance which he did not secure.

However, it was agreed that the defendants would pay Mr. Ware \$5.00 per month as an Idaho agency for handling a small amount of countersigning. This supplementary contract (Exhibit 1-R. 50-51) was fulfilled by the parties for five years and eight months without any question being raised as to its propriety. Checks were sent by the defendants to Ware for each month beginning with October 1936 and through and including May 1942 and Mr. Ware cashed all of these checks, the May 1942 check for the month in which he countersigned the three policies under the Comprehensive Insurance Rating Plan having been cashed by him on June 3, 1942 (Def. Ex. 6, R. 119).

The court found (Finding IX, R. 87-88):

“That on or about October 1, 1936, Eugene H. Ware entered into a written contract with the defendants, as found by Paragraph III of these findings of fact. That on or about October 21, 1936, the said Eugene H. Ware entered into a valid supplemental agreement with the defendants by the terms of which defendants agreed to pay to the said Eugene H. Ware and Eugene H.

Ware agreed to accept a monthly remuneration of \$5.00 for countersigning insurance policies issued by defendants on Idaho risks in the case of proposals for insurance secured outside the state and not secured by Eugene H. Ware. That the aforesaid contract and supplemental agreement thereafter continued in full force and effect and the countersigning services rendered by Eugene H. Ware were rendered under and pursuant to the aforesaid contract and supplemental agreement. That the said Eugene H. Ware has been paid in full by defendant for the countersigning services by him rendered."

3. Sec. 40-905 I.C.A., prior to the July 1, 1947 amendment, authorized countersigning services to be rendered for compensation by way of salary or for no compensation if the insurance company and the agent so agreed.

At the time of the transactions in question, Idaho had no statute fixing premium rates and had no statute fixing compensation to be paid to agents. Sec. 40-905 defined an agent as "any person who, *for compensation, or otherwise*, solicits insurance * * * or in any manner aids in the transaction of the business of an insurance company." The term "compensation" is sufficiently broad to cover compensation by way of commission or by way of salary. The term "or otherwise" is used in contradistinction to the term "compensation." It is broad enough to mean "no compensation" because no compensation would be "otherwise" than compensation. The reference to "aiding in any manner" indicates services, in addition to those first mentioned in Sec. 40-905; i.e. the solicitation of insurance and the receiving of applications and the

transmitting of an application for a policy. Obviously, therefore, when Ware agreed by his contract of October 1, 1936, that no separate compensation was to be paid for countersigning services rendered thereunder, and when he agreed by his supplementary contract to be paid \$5 per month for a small amount of countersigning services, he was performing the services of an agent in the manner and under the terms and conditions specifically authorized by Sec. 40-905.¹

4. The plaintiff is not entitled to commissions for countersigning services rendered, by virtue of the provisions of Sec. 40-902 I.C.A. as amended by Chapter 61, Idaho Session Laws of 1939.

(a) The meaning of the phrase "the full commission" in Sec. 40-902.

(1) The phrase "the full commission" means "full commission, if any."

The trial court found (R. 85, 86) that no commission was payable or paid by the defendants to any agent or broker for placing the insurance on the construction of the Farragut Naval Station with the defendants. He concluded (R. 91) that the statute "contains no provision fixing the amount of commission that should be paid to the plaintiff for countersigning services rendered by him, nor does any provision of said statute apply to the facts in this case so as to permit recovery, * * *." It is, therefore, pertinent to in-

¹The correctness of the foregoing analysis is emphasized by the fact that under the July 1, 1947 amendment to Sec. 40-905, the language "compensation or otherwise" has been eliminated and there has been substituted therefor the phrase "* * * compensated * * * on a commission or salary basis, or both, * * *."

quire concerning the meaning of the phrase "the full commission" contained in the statute on which plaintiff relies.

Insurance companies compensate agents who secure proposals for insurance either by salary, commission, or salary and commission. Mutual casualty companies generally write on a no-commission basis through salaried employees, whereas stock companies usually write insurance on a commission basis. However, such business practice is not inexorable because mutual casualty companies may write on a no-commission basis. Generally speaking, however, as stated in *Kulp, Casualty Insurance*, p. 173,

"The mutual * * * is organized usually on the branch office system and thus reduces its production cost, because its employees receive a salary instead of the rather liberal commissions paid by stock companies to their agents."

The evidence in the case at bar shows that this statement is true both within and without the state of Idaho. Indeed, Idaho recognized that an insurance agent may be either a salaried or a commissioned agent, because Section 40-905 defines an agent as "any person who *for compensation, or otherwise*, solicits insurance in behalf of any company receiving applications for insurance." The statute, it will be noted, does not say "any person who for commission * * * solicits insurance"; it uses the broader term "for compensation," which obviously may be in the form of salary. It is apparent, therefore, that in Idaho, as elsewhere, an insurance agent may produce insurance business and be compensated either by way

of salary or by way of commission, or by a combination of both. Nothing in the Idaho law requires any particular method of compensation, that being left to the parties to determine by their agreement. Indeed no compensation for a special service need be fixed (p. 15 *supra*).

As stated in *Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co.* (Pa.) 190 Atl. 924, 927, involving a suit by an insurance agent to recover commissions on home office issued policies that he had countersigned:

“The argument of the plaintiff would be more persuasive if the act specified the rate of commission to be collected. The absence in the act of a specific requirement concerning the rate to be paid permits the parties to fix for themselves the rate of commission and method of payment.”

Bearing the foregoing discussion in mind, let us consider Section 40-902 to the extent here applicable on the question of compensation to countersigning agents. That statute provides, with respect to foreign companies,

“A resident agent shall countersign all policies so issued * * * and shall receive the full commission when the premium is paid * * *.”

Obviously, the statute can have no application in the case of a policy in connection with which a commission is neither paid nor payable. Thus, in the case of a mutual company issuing a policy through a salaried agent, no commission is payable; or in the case of a stock company issuing a policy on a no-commission basis, no commission is payable. The most that can

be reasonably contended for, in view of the well recognized insurance practice and the right of salaried agents to be insurance agents, is that the statute means merely that a resident agent who countersigned shall receive "the full commission" if the policy has been issued on a commission basis so that a commission is paid or payable. The statute does not say that policies can be issued only on a commission basis, nor does it say whose commission is involved—that is, whether a producing agent, a regional agent, or a general agent. Nor does it define the word "commission." Nowhere else in the Insurance Code is there any statutory regulation of compensation payable. Under such circumstances, the phrase "the full commission" merely means the full commission, whatever it is, or if any there be, payable in connection with the securing of insurance proposals. If there be no commission paid to any agent—especially if none is paid or payable to a producing agent—then none can be payable to the countersigning agent. Any compensation that the countersigning agent is to receive for his services in countersigning is then left to agreement between the countersigning agent and the insurance carrier.

The interpretation here suggested not only takes into account the practices of the insurance world in connection with which the statute should be read; it also avoids the objection that an unconstitutional discrimination exists as between companies writing insurance on a no-commission basis and companies writing insurance on a commission basis. To require stock companies to pay a commission to countersign-

ing agents and to free mutual companies of such a requirement because of their method of doing business would be violative of the XIVth Amendment. *Hartford Steam Boiler Inspection & Ins. Co. et. al. v. Harrison*, 301 U.S. 459. The interpretation here suggested, however, puts both stock and mutual companies, each of whom may write business on a no-commission basis, on a parity. If a commission is payable on a policy, whether written by a mutual or a stock company, then the statute treats both companies alike. Similarly, if a policy is written on a no-commission basis by a mutual company or by a stock company (policies written under the War Projects Rating Plan), then stock and mutual companies are treated alike, without discrimination. In the case at bar, the evidence shows that policies written under the War Projects Rating Plan were written by both stock companies and mutual companies, on a no-commission basis.

If Section 40-902, in its use of the phrase "the full commission," means "the full commission, if any there be," then obviously the plaintiff cannot recover as to the three policies written under the Plan, regardless of any other question in the case. As to the last two policies not written under the Plan, and with respect to which a commission was paid to New York brokers, this argument is not available, and recourse must be had to the argument next stated, which argument also provides an additional reason in support of the defendants' contention that the plaintiff is not entitled to recover.

The argument referred to may be stated as follows: Appellees have pointed out heretofore and will point

out hereinafter additional reasons why Ware is not entitled to recover. At this point, however, it is sufficient to call attention to the fact that Ware has been paid in full because (a) under Ex. A, par. 4 and par. 8, Ware is required to render countersigning services without additional charge; nevertheless, (b) the parties have agreed on additional compensation for countersigning policies produced outside the state (Ex. 7, 22), by entering into the \$5-per-month contract hereinbefore described. Under this contract Ware regularly collected \$5 a month from October 1, 1936, to and including May 31, 1942, and there is no evidence that the contract was ever cancelled. Accordingly, compensation payable under Ex. A, par. 4 and par. 8, and under the \$5-per-month contract, constitutes "the full commission" payable to Ware for countersigning and for which he has been paid in full. *Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co.*, *supra*, p. 927:

"There is no requirement of public policy preventing the parties from so grading the rates of commission on other types of business, that the return received therefrom would be sufficient to compensate the agency for countersigning home office policies as well."

Appellant claimed that Ware was entitled to recover customary commissions payable to agents who might have procured such business in Idaho (Ap. Br. 26, *et seq.*). The trial court rejected that contention (R. 75, 91) partly because the statute did not so provide (*Birdsall-Friedman Co.* case *supra* so holds) and partly because the evidence failed to show the existence of the custom claimed (R. 90). In fact,

plaintiff's own evidence (R. 111) showed that the rate of commission payable to a producing agent in Idaho varied with the size of the policy or risk, the rate going down as the size of the risk went up and that even such rate varied with the various companies. There was evidence that no commission would be payable with respect to the retrospective policies in question, the policies being written under the War Projects Insurance Rating Plan.

Appellant also claimed that the full commission is that commission which would be payable if the agent produced the business himself, citing the opinion of the Attorney General of Montana to that effect with reference to the distinguishable Montana statute, *Springfield Fire and Marine Ins. Co. v. Holmes*, 32 F. Supp. 964. The court in the *Springfield* case did not pass upon the correctness of the interpretation; it merely proceeded to examine the constitutionality of the Montana statute as so interpreted. The court carefully said, 32 F. Supp. 986:

"In this view we do not feel called upon to consider or determine, and do not consider or determine, whether Chapter 95 of the Laws of Montana, 1937, may be so construed as to bring it within the constitutional power of the Legislative Assembly of the State of Montana."

In the *Springfield* case the policy involved was written on a commission basis, a commission having in fact been paid to the broker securing the business. The Circuit Court of Appeals in the Ware case, by its reference in Footnote 3 to the Attorney General's opinion, does not decide that the Attorney General's opinion is

correct; it merely refers to that opinion in passing, leaving to the District Judge on the trial of this case the proper interpretation of the phrase "the full commission."

The District Judge below held that the phrase "the full commission" did not entitle the plaintiff to recover (R. 76, 91). It is obvious that the Attorney General's opinion with respect to the Montana law was not rendered in respect to policies written under the Comprehensive Insurance Rating Plan on a no-commission basis.

Assuming, however, that the phrase "full commission" has the meaning attributed to it by the Montana Attorney General, what would have been the commission payable to Ware had he secured the first three policies written under the Comprehensive Insurance Rating Plan? Obviously, nothing.

R. 172:

"Q Mr. Peterson, if this business had been placed in Idaho, this business covered by the three policies here, under the War Projects Rating Plan would any commission have been payable to any producing agent under that plan?

A. No."

(2) Section 40-902 does not prohibit the countersigning agent from sharing the commission with another or from making any arrangements in relation thereto which are satisfactory to him.

Section 40-902 stipulates "that a resident agent shall counter-sign all policies so issued * * * and shall receive the full commission when the premium is paid,".

There is no provision in the statute that the agent shall not pay or divide the commission with anyone who has assisted in procuring the business. In this respect the provision is in contrast with Section 40-1002 (App. 2) in which it is expressly provided, with reference to a licensed special agent assisting a local agent in writing business that "local agent is to retain his full commission."

The absence of any express prohibition against the countersigning agent dividing his commissions with a producing agent or against his making any other arrangements in relation thereto which are satisfactory to him and to the company and to the producing agent is in contrast to the provisions of the Montana statute reading—

"It shall be unlawful for any such resident agent to rebate or divide such commission, with intent to evade the provisions of this act."

The Idaho statute is also in contrast on this point with the provisions of the Virginia statute which are that the resident countersigning agent shall be entitled to and shall receive "the usual and customary commissions * * * provided * * * the resident agent or agency in Virginia may allow or pay to such licensed non-resident insurance brokers, a commission not exceeding 50% of the resident agent's or agency's commission allowed on such business."

(3) The 5% provision inapplicable.

During the course of trial and argument, reference was made to the fact that under Sec. 40-902 there was a further provision that "when said policy is made,

written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than 5% of the premium paid: * * *” The reference to licensed broker obviously means a licensed broker under Idaho law. Plaintiff does not claim that the policies were made, written or placed by a licensed broker. Paragraph IX of the complaint alleges “that all of the policies were written by the Company direct to the Walter Butler Company and were written and placed with the Walter Butler Company and that the plaintiff acted as countersigning agent direct and not through any licensed broker.” Indeed, the only licensed brokers under Idaho law that could exist in the years 1942 and 1943 were licensed fire insurance brokers under Chapter 15, Title 40, I.C.A. 1932 (App. 2).

It is true that an act relating to insurance brokers generally became effective on April 30, 1943, Session Laws of Idaho 1943, Chapter 172. That statute was approved March 8, 1943, without an emergency clause; therefore, it did not become effective until 60 days after the end of the legislative session, which ended on February 28, 1943 (see p. 408 of 1943 Session Laws), making the effective date of the act on or about April 30, 1943. See also Section 65-510 I.C.A. (App. 3).

However, the first three policies here involved were issued May 18, 1942, and the last two policies were issued in February, 1943; hence, all five policies were issued and countersigned at a time when the only licensed brokerage law was the law applicable to fire insurance brokers. None of the policies here involved

is a fire insurance policy; consequently, there is no basis for applying the 5% of the premium exception above quoted.

Appellant conceded this below as noted by the trial court (R. 71).

(b) The defendants did not "make, write, place, or cause to be made, written or placed in this state" any policy or bond here involved so as to entitle plaintiff to commissions if any were payable, even though the policies were on "property * * * located in this state."

(1) Preliminary Statement.

The court found on the basis of uncontradicted evidence (R. 80, Finding VI, *n*, 82).

"That pursuant to the aforesaid Comprehensive Insurance Rating Plan said Walter Butler Company caused to be made, written and placed in the State of New York through Acme Brokerage Corporation, the insurance advisor of Walter Butler Company, the following insurance policies: (describing the first three)."

With respect to the two small policies the court found (Finding VII, *n*, R. 87):

"That premiums for each of said policies were paid to the defendants through Acme Brokerage Corporation of New York, N.Y., who placed said insurance business with the defendants in New York."

Section 40-902 I.C.A., as amended (Finding X, *n*, R. 88, Br. p. 6, *supra*) forbids a foreign insurance company doing business in Idaho,

“* * * to make, write, place or cause to be made, written or placed *in this state* any policy or contract of insurance of any kind or character, * * * upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state, legally commissioned and licensed to transact insurance business therein.” (Italics ours)

A second requirement is that:

“A resident agent shall countersign all policies *so issued* (except policies of life insurance) * * *.” (Italics ours)

General comments as to the history of the statute.

In appellees' brief on the first appeal the history of Section 40-902 I.C.A., as amended, was carefully reviewed (Br. for Appellees, p. 10, *et seq.*) with a view to pointing out that the distinction between “making, writing or placing” and “countersigning” was justified, not only by present textual analysis, but also by consideration of the statute's history. It was further demonstrated that the words “policies made, written or placed” were more restricted in meaning than “policies on risks in this state.” The same historical discussion made quite clear the fact that language “in this state” added to the statute by amendment in 1915 after the words “to make, write, place or cause to be made, written or placed” were intentionally inserted to restrict the operation of the statute. By reason of space limitations, the former discussion is not repeated.

(2) *The words "made, written or placed in this state" contained in Section 40-902 show that the section does not apply to the policies and bond issued to the Walter Butler Company, because they were negotiated and written outside of Idaho.*

The heart of Section 40-902, in so far as here applicable, is that it is declared unlawful for any foreign insurance company doing business in the state

"to make, write, place or cause to be made, written or placed *in this state* any policy * * * of insurance * * * upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state * * *. A resident agent shall countersign all policies so issued * * * and shall receive the full commission when the premium is paid * * *." (Italics ours)

The words in italics 'in this state' were *deliberately* added to the statute in 1915 (Idaho Session Laws 1915, Chapter 145, §131, p. 318). The same words were also and *deliberately* added to Section 40-809 by Chapter 145, Session Laws of 1915. The words "in this state" inserted by the Idaho Legislature in 1915 after the word "placed" were intended either to confirm the prior understanding as to the restrictive character of the statute or to impose a restriction not theretofore existing (See *United Pacific Co. v. Bakes* (Ida.) 67 P.(2d) 1024, p. 1028) (App. 3-4).

It may be that one reason for the amendment by the insertion of the words "in this state" was the doubt then entertained as to the constitutionality of a statute which purported to apply to contracts of insurance made outside the state. See *Hyatt, State Ins.*

Com'r. v. Blackwell Lumber Co., 31 Ida. 452, 173 Pac. 1083 (1918), involving Laws of 1913, Chapter 185, Sec. 15.

Space limitations do not permit us to repeat the textual analysis made of Section 40-902 in the Brief for the Appellees, p. 20, on the first appeal in the Ware case.

It would seem clear that the words "make, write or place" were used in the statute to cover all situations in connection with the negotiation or production of business. They are words of similar import, and mean substantially the same thing in so far as the underlying purposes of this statute are concerned.²

The apparent intent of the statute was directed toward the activities in Idaho of agents of foreign insurance companies and its object was to see that business originating in or solicited or procured in Idaho should be handled only through a resident licensed agent in the state.

The key to this intent is furnished by the title to the original act (House Bill No. 73, 1901 Idaho Laws, page 138) which reads:

"An Act to Prevent Non-Resident Insurance Agents from Writing Any Policy or Contract of Insurance Within the State of Idaho."

²In *Potomac Fire Insurance Company v. State* (Tex.) 18 S.W.(2d) 929, 931, there appears the following from the stipulated facts:

"When an agent has solicited and secured an application for insurance from a property owner, the agent selects one of the companies which he represents, and 'places' or 'writes' the risk in the company so selected by him."

It is interesting to note that when the Idaho Legislature wished to avoid any restriction for tax purposes, it provided in Section 40-803 (App. 4) (dealing with fire and marine insurance) that the premium tax was applicable "on risks situated in this state"³ and in 1921, when it wished to impose no restriction on the kind of policies with which it was dealing, the statute provided (40-1501, Laws 1921, Chapter 1943) that its operation would be with respect to "business on property or risks located in Idaho." Such statutes evidence clearly by contrast the deliberate restrictive character of the countersignature statute, 40-902, and as further evidencing the fact that such a restriction is by no means inadvertent (App. 2).

A comparison of the Idaho countersignature requirements with those in other states shows that the "in this state" limitation is pursuant to a definite policy to confine the operation of the countersignature statute to Idaho risks only when the policy is made, written or placed in Idaho. Countersignature statutes for present purposes fall into three general classes: (a) states (seven, including Idaho) requiring countersignature of policies on risks located in the state only when the policies are made, written or placed in the state involved (App. 6); (b) states (fourteen) requiring countersignature of policies on risks located in the state, irrespective of whether the policies are made, written or placed in the state involved (App. 7); and (c) states (three) requiring countersigna-

³See also Section 40-804 (App. 5) dealing with insurance other than fire and marine and imposing the tax "on risks in this state."

ture of policies on risks in the particular state in certain instances and on all risks in other instances, but in language other than that found (a) and (b) above (App. 8).

The policy of restricting the operation of the countersignature statute to risks made, written or placed in Idaho has now been changed.

Sec. 40-901 and Sec. 40-902, amended July 1, 1947, have eliminated the "in this state" limitation heretofore existing and with certain exceptions, policies, no matter where made, written, or placed, become subject to the act if made, written or placed on "risks or property located in the State of Idaho" (App. 5-6).

(c) The wording and meaning of the Idaho Statute as contrasted with the wording and meaning of the Montana and Virginia countersignature statutes, showing that the Idaho statute is clearly different and distinguishable.

The comparison of certain provisions of the Idaho countersignature statute and the provisions of the Virginia and Montana countersignature statutes emphasizes the differences in the provisions and the differences in the meaning of the Idaho law as distinguished from the Virginia and Montana laws. The differences between the facts of this case and the factual assumptions underlying the decision in the case of *Osborn v. Ozlin*, 310 U.S. 53, 84 L. ed. 1074, 60 S. Ct. 758, involving the Virginia countersignature statute, and the facts underlying the decision in the case of *Holmes v. Springfield Fire and Marine Ins. Co.*, 311 U.S. 726, 85 L. ed. 473, 61 S.

Ct. 129, involving the Montana countersignature statute, are also of significant importance and will be discussed herein.

The relevant portions of the Virginia Statute and Montana Statute will be found in the footnote.⁴

The principal differences between the Idaho statute on the one hand the Virginia and Montana statutes on the other are:

1. The Idaho statute by reason of the "in this state" qualification does not apply extra-territorially.

Both the Virginia statute and the Montana statute apply extra-territorially. The Virginia statute applies to "contracts of insurance on persons or property herein." By using the quoted words, Virginia clearly intended its statute to apply to all policies of Virginia risks irrespective of whether the policies are made, written or placed in Virginia or not.

The first part of the Montana statute, like the Idaho statute, provides that it is unlawful "to make, write, place * * * *in this state*" any policy of insurance upon any insurable risk resident, situated or located in the state. The Montana statute, however, contained additional provisions with respect to policies issued at its principal or department offices by an insurance company. This additional proviso read in part:

"* * * provided that nothing in this Act shall be construed to prevent any insurance company * * * from issuing policies * * * at its principal or department offices, covering property * * * situated or located in this state; provided, how-

⁴See Appendix, p. 8-11.

ever, *such policies* are issued upon applications procured and submitted * * * by a resident agent, who shall * * * countersign the same, and that said resident agent * * * shall receive the full commission on all policies when premium is paid." (Italics ours)

The effect of this additional provision is to make the Montana statute apply to policies on Montana risks irrespective of whether the policies are made, written or placed in Montana. These additional provisions give the Montana statute an extra-territorial application like the Virginia statute.

There are no provisions in the Idaho statute applicable to policies made, written or placed outside of Idaho. Provisions applicable with respect to home office issued policies were included in the original enactment of the Idaho statutes but were eliminated by amendment in 1911.

It is very likely that these additional provisions were originally included to make clear that Idaho recognized the propriety of the standard insurance practice of issuing policies at the home office, and wanted to safeguard this practice. When in 1911 Idaho recognized that such provisions might make its statute applicable to such policies on Idaho risks made, written or placed *outside of Idaho*, she eliminated them in order to make clear her original intent, consistent with the other provisions of the statute, to make it applicable only to policies on Idaho risks made, written or placed in Idaho.

2. The Idaho statute is made applicable only to foreign insurers.

The Virginia statute and the Montana statute apply to all insurers.

The distinction emphasizes the point that countersignature in Idaho of policies made, written or placed in Idaho is designed as a further means of securing to the citizens of Idaho the "valuable advantages secured in dealing with a company authorized by the state." Countersignature in Idaho of policies made, written or placed in Idaho *by an Idaho company* is not required to secure to the citizens of Idaho the advantages of dealing with a company authorized by the state. The Idaho law is silent on the subject of countersignature of policies made, written, or placed outside of Idaho either by a company domiciled in Idaho or by a company not domiciled in Idaho.

3. There is nothing in the Idaho statute which would prevent the Idaho agent from giving up entirely any commission which he might initially be entitled to with respect to business made, written or placed in the state or from sharing a commission which he was entitled to on such business, in any way he saw fit with any other party.

The Virginia statute contains a specific requirement to the effect that the resident countersigning agent

"shall be entitled to and shall receive the usual and customary commissions * * * provided * * * the resident agent or agency in Virginia may allow or pay to such licensed non-resident insurance brokers, a commission not exceeding 50% of the resident agent's or agency's commission allowed on such business."

The Montana statute contains a provision reading in part as follows:

“It shall be unlawful for any such resident agent to rebate or divide such commission, with intent to evade the provisions of this Act; * * *”

This provision was cited by the Attorney General of Montana in his opinion of November 30, 1937 (32 F. Supp. p. 975) as authority for his ruling that the Montana agent was not permitted to make any rebate or share a commission with an out-of-state agent forwarding the policy for countersignature.⁵

It is interesting to note that the Montana statute upon which the *Holmes* decision was based was changed materially in 1941. The amended law contains a provision whereby the countersigning agent in Montana was to receive a commission of not less than 5% of the premium but this was subject to a qualification reading:

“nor shall any of the provisions of this act apply to the business of mutual or stock insurance companies who solicit insurance by salaried representatives and upon which no commission is paid.”

The Idaho statute contains no qualifications as to who the resident agent may be.

4. Section 40-902, I.C.A., provides:

“* * * A resident agent shall countersign all policies so issued. * * *”

⁵In brief for the appellees, pp. 34 to 36, on the first appeal, the statutory provisions of a number of states are analyzed dealing with the subject of the sharing of commissions. These provisions fortify our contention that it is valid to share or make other arrangements unless there is a specific prohibition against it.

Section 40-905, I.C.A., defines an agent as:

“Any person who, for compensation or otherwise, solicits insurance * * * or in any manner aids in the transaction of the business of an insurance company.”

There is no qualification whatsoever as to who the resident agent may be.

Thus, under the Idaho law, it is possible for a salaried representative of any company who had received a license as an agent to countersign a policy to the extent required by Section 40-902.

The Virginia statute contains the following provision:

“No state agent, special agent, company representative, salaried officer, manager or other salaried representative of any regularly authorized insurance company, except a mutual insurance company, shall countersign any contract of insurance or surety * * * covering persons or property in this state.”

5. Under the Idaho law, no service is required of the countersigning agent other than the simple ministerial act of affixing his signature, and such requirement is not needed to buttress other provisions of the Idaho law (See p. 39, *infra*) (See App. 6).

Under the Virginia statute as construed, the countersigning agent had an obligation to supervise the contents and form of the policy and to render services during the life thereof, both to the assured and the company, just as if he had negotiated the contract.

The Montana statute requires the countersigning agent to keep a record of all countersigned risks, to

the end that the state may collect its tax revenues. Since the effect of the various provisions of the Montana statute is to make it apply to all policies on risks located in Montana, there is nothing inconsistent in the proviso relating to countersignatures, which reads:

“* * * to the end that the State may receive the tax required by law to be paid on premiums collected for insurance on all persons, property or other insurable risks resident, situated or located within this State; * * *”

This provision in and of itself differentiates the true meaning of the Montana statute from the Idaho statute.

A somewhat similar statement of purpose was eliminated from the Idaho statute in 1939. By its deletion Idaho recognized that the application of Section 40-902 did not parallel the application of its tax provision in Section 40-804 (see pages 28-31, *supra*) and that such a statement of purpose was inconsistent with the real intent and purpose of Section 40-902 to restrict the making, writing or placing in Idaho of any policy or contract unless done through a resident agent of Idaho.

In addition to the differences in the Idaho statute as contrasted with the statutes of Virginia and Montana, there are also the following important differences between the facts of this case and the facts of the cases in light of which the Virginia and Montana statutes were discussed:

1. The *Ware* case involves a writing of insurance on a no commission basis under the War Projects In-

insurance Rating Plan. No commission was paid on any business written under that Plan.

In the Virginia case it was assumed that commissions were payable on all insurance business written. The War Projects Insurance Rating Plan, was, however, approved and used in Virginia during the war.

In the Montana case an actual commission of 10% was paid to an outside agent and a 5% commission paid to a resident agent. The opinion of the Attorney General of Montana as to the meaning of "full commission" was obviously rendered on the assumption that a commission would be payable on the insurance written.

2. Evidence in this case shows that Ware performed no services whatever other than countersigning, and that all services performed by the defendant companies were performed in exactly the same manner as they would have been performed whether or not the policies were countersigned (R. 232, *et seq.*)

In the Virginia case, the evidence showed that under the statute, as it was construed, the countersigning agent was required to perform services in supervising the contents and form of the policy and was required to render services during the life thereof, both to the assured and to the company, just as if he had negotiated the contract. This requirement of the Virginia law is entirely absent here, and this is an important difference.

It will be noted, therefore, from the contrasting provisions of the Idaho statutes on the one hand with those of the Virginia and Montana statutes on the other, as well as important differences in the facts in

the Virginia and Montana cases and in this *Ware* case, that the Idaho statute under consideration differs in very material and important respects from the Virginia and Montana statutes which were under consideration in the *Osborn* and *Holmes* cases.

One further matter might well be discussed at this point in developing more clearly the meaning of Section 40-902 of the Idaho Code Annotated, as amended. Reference is here made to the text of Section 40-902 as set out in the appendix of this brief. If the provisions of this statute are considered in light of the other provisions of the Insurance Code, it becomes apparent that countersignature found below to be a mere ministerial requirement (R. 89) performs no function in buttressing the other provisions of the Insurance Code. Section 40-906 (App. 11) provides that it shall be unlawful for any person to act within the state as an agent without a certificate of authority. This is in no way related to countersigning. Section 40-809 (App. 12) provides for the filing of an annual statement by all companies licensed to do business in the state with the filing authority. This statement incorporates provisions adequate for determination that the company is in such financial condition as to warrant continuance of its right to do business in the state. Section 40-1107 (App. 13) contains provisions prohibiting rebates. This is in no way related to countersigning. Section 40-804 (App. 5) requires the filing with the department annually under oath of a statement showing the amount of all gross premiums received by the company on risks in Idaho during the preceding year and the payment of tax thereon. This

is in no way related to countersigning. Section 40-708 (App. 16) contains provisions for examination of foreign companies. There are additional provisions in Section 40-711 (App. 16) relating thereto, and a provision in Section 40-712 (App. 17) with respect to impairment of capital. The countersignature requirement has no relation with reference to these statutes. Chapter 25 provides for the licensing of insurance adjusters. Countersignature requirements have no relation thereto. The Workmen's Compensation Act provides for approval of awards by the Industrial Accident Board. There are additional provisions in Section 43-1601 (App. 17) of the Compensation Act with respect to safeguarding the financial ability of companies which file surety bonds for employers. Countersignature requirements on policies have nothing to do with these provisions. Furthermore, Idaho has no law covering rates for bonds to secure the workmen's compensation obligations, and no law covering the rates which may be charged for compensation policies, which are entirely apart from the required bonds. Neither does Idaho have any laws requiring that rates for automobile liability or general liability be subject to approval. It is obvious, therefore, that countersignature performs no function in buttressing any of these statutes. These statutes are adequate standing by themselves, unaided by countersignature requirements, to perform the function that they were enacted to serve. They would not be one whit better administered if policies were countersigned, nor would they be one whit less efficiently administered if policies were not countersigned.

(d) The statute (Sec. 40-902) is not to be read into the plaintiff's contract as a part thereof, so as to confer a cause of action in favor of plaintiff against the defendants.

Assuming, for the sake of argument, that the statute should be interpreted in accordance with the plaintiff's contention as having extra-territorial effect, nevertheless the statute by its terms does not purport to impose liability on an insurance company in favor of a resident agent who countersigns bonds or casualty policies. The Idaho Code (Section 40-903, App. 20) merely provides a penalty for willful violation of Section 40-902, but no provision is made to confer a right of recovery on the countersigning agent. If it were intended to confer such a right of recovery on a countersigning agent, it would have been a simple matter to so provide when provision was made for sanctions to insure compliance with Section 40-902. Thus, in Iowa, it is provided by the Iowa Insurance Code, 1935, as amended by 1939 Session Laws, Chapter 28 S.F. 164, Section 6:

“The resident countersigning agent shall have a direct claim against the insurance company issuing such policy, or contract of insurance or endorsement thereto for his commission in accordance with the two preceding sections. The liability of such company for such commission may be enforced in an action at law or equity as the case may be.”

The fact that the Idaho law provides no such sanction but does provide a penalty for willful failure, indicates that no such sanction was ever intended. After all, it will be recalled that the countersignature

requirement was originally imposed in the language of the 1911 Amendment (Chapter 228, Idaho Laws 1911, p. 744)

“to the end that the State may receive the tax required by law to be paid on the premium collected for insurance on all property located within this state.”

The purpose was not the creation of a civil cause of action in favor of a countersigning agent. The state sought to protect its own tax revenues, whether the countersigning agent received a commission or not, and a penal sanction was an appropriate remedy to insure the collection of such revenues. The question of sanctions was not left to inference; it was a matter specifically considered, and—what is more important—specifically provided for by Section 40-903 (App. 20). Provision was even made for the civil collection of the penalty imposed. The fact that, contemplating the possibility of civil collection, the Legislature made no provision for civil collection by the countersigning agent on his own behalf, is the best possible evidence that the *sole* sanction provided was that provided in Section 40-903 (App. 20).⁶

The matter is one of legislative intention, and it by no means follows that if a penal statute has been violated a person claiming to be injured by reason thereof acquires a civil cause of action. See

⁶That the legislature contemplated the possibility of civil sanctions, but only on behalf of the state, is further evidenced by Section 40-807 (App. 21) dealing with the civil collection of a penalty for failure to pay premium tax.

Hitson v. Dwyer (Cal.) 143 P.(2d) 952, holding that a statute making it a misdemeanor to sell alcoholic beverages to an obviously intoxicated person was not adopted for the benefit of an intoxicated person so as to give him a right of action for the violation of the statute.

Evers v. Davis (N. J.) 90 Atl. 677, holding that the Tenement House Act of 1904 is purely a public statute enforceable by specified penalties and evincing no legislative intention that in addition thereto the class of persons for whose protection it was enacted should have a private right of action resulting from a violation of its provisions.

Taylor v. L.S. & M.S.R. Co., 7 N.W. 728, and *Flynn v. The Canton Company*, 40 Md. 312, 17 Am. Rep. 603, holding that an action for damages will not lie against the owner of property abutting a sidewalk in a city on account of injuries occasioned by snow and ice thereon although he is required by city ordinance to remove snow and ice from the sidewalk, which he neglected to do.

In *Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co.* (Pa.) 190 Atl. 924, which was an action by an insurance agent to recover commissions for counter-signing services rendered under a statute similar to and almost identical with that herein involved, the court refused to permit plaintiff to recover under the statute in the absence of a contract for the compensation claimed. In other words, the court held that the statute alone even when coupled with a custom didn't confer a cause of action upon the plaintiff.

In his memorandum opinion the trial judge first held (R. 70) :

“If Ware was to receive this commission it must be found that he was entitled to it as a matter of law as the plaintiff’s right is wholly dependent on the Statute.”

“* * * it is agreed that this action is prosecuted, not on the contract, but on the statute.” (R. 73).

(R. 75) :

“It cannot be said that an agent is specifically given, under this section of the statutes, a right of action to recover and if the statute was to be so construed, that he does have a right of action, his right to recover is limited to the full commission that was paid to out of state agents in writing the policies.”

The court has, therefore, found (pursuant to the mandate of this court to determine the matter under the local law) that under the Idaho law the statute on which the plaintiff relies does not give the plaintiff a cause of action in his favor. Accordingly, the plaintiff cannot recover *on this ground alone* regardless of the merits, if any, of his other contentions.

5. The defense of waiver of commissions by contract.

In the foregoing discussions, attention is called to the fact that under the agency contract the commissions payable on proposals secured by Eugene H. Ware were to constitute “full compensation for all services,” including the countersigning services contemplated by Section 8 of that contract and Exhibit A-1 attached thereto. In addition, attention has heretofore been

called to the supplemental agreement evidenced by letter dated October 21, 1936 (Exh. 7, 22, R. 50, 120, 162), whereby defendants agreed to pay Eugene H. Ware and he agreed to accept the additional sum of \$5 per month for his countersigning services. He rendered these services to the defendants, including countersigning services for the policies involved. As Mr. Peterson testified (R. 223):

“A He countersigned policies other than these.

THE COURT: He countersigned other policies?

A Yes sir, several policies.”

(R. 164):

“Q Subsequently to this letter of October 21, 1936, which is in evidence, were risks submitted to Mr. Ware for countersignature?

A They were.

Q That is on out-of-state business?

A Yes, sir.”

The phrase “out-of-state business” merely meant business produced outside of Idaho on risks in Idaho (Ex. 22, R. 162, 163). For this small amount of countersigning service, defendants agreed to pay Eugene H. Ware, and he agreed to accept, the sum of \$5 per month (Ex. 7, 22). Each month for 68 months (Ex. 6, R. 120) to and including May 31, 1942, defendants paid and Eugene H. Ware accepted the sum of \$5 per month as contemplated for countersigning policies. The payment was made and accepted for May, 1942, for countersigning the three policies issued May 18, 1942, and the Idaho compensation bond May 14, 1942. Indeed, the May check was cashed June 3, 1942, without demur or objection after the first three policies and

bond were countersigned and the three policies mailed to the New York office of the defendants.

The court found (Finding IX, R. 88) :

“That the said Eugene H. Ware has been paid in full by the defendant for the countersigning services by him rendered.”

No claim for additional compensation was made by Eugene H. Ware in connection with the countersignature of the first three policies and bond, either at the time of countersignature or at the time that the three policies were mailed to the New York office of the defendants, or at the time that the \$5 check for countersigning services rendered for the month of May was cashed. It was only some time after the policies and bond were countersigned in May under the aforesaid \$5-per-month contract that Eugene H. Ware raised any question with respect to the validity of that contract. That the contract is entirely valid has already been pointed out, but it might be well to again call attention to the one case in the country that has considered the validity of a contract under a statute similar to that of Idaho, which case has upheld the validity of the contract.

In *Birdsall-Friedman Co. v. Globe & Rutgers Inc. Co.* (Pa.) 190 Atl. 924, a countersigning agent sought to recover commissions on home office policies which he had countersigned under the Pennsylvania law. The Pennsylvania statute (App. 22) is substantially identical with the Idaho statute, Section 40-902, the differences having no bearing upon the principles adopted in that case. The question of the necessity of an agreement for commissions for countersigning

home office policies as being a condition precedent to a right of recovery was then discussed. The court said, p. 927:

“(3) The requirement of article 5, §501, of the Act of 1921 (40 P.S. §631), *supra*, adds nothing to the rights of the plaintiff. *We cannot agree with the contention of plaintiff that the provisions of the act, coupled with a certain trade custom, require the payment of a 10 per cent commission, in the absence of an expressed understanding to that effect. The argument of the plaintiff would be more persuasive if the act specified the rate of commission to be collected. The absence in the act of a specific requirement concerning the rate to be paid permits the parties to fix for themselves the rate of commission and method of payment. There is no requirement of public policy preventing the parties from so grading the rate of commission on other types of business, that the return received therefrom would be sufficient to compensate the agency for countersigning home office policies as well. The primary legislative purpose was to secure the payment of taxes due the commonwealth, and here there are no taxes shown to be in default.*” (*Italics ours*)

It is obvious, therefore, that under the provisions of the agency contract, particularly Section 8, and Exhibit A-1 attached thereto, and under the supplemental \$5-per-month contract, the parties had made a valid contract for the compensation to be paid the countersigning agent.

The court below in his opinion (R. 75) stated:

“There was nothing unlawful in Mr. Ware making the contract with the defendant compan-

ies that he would countersign the policies at five dollars per month."

In his findings, paragraph IX, R. 87, he also so found.

6. The Idaho resident agency statute involved (Sec. 40-902) if construed in accordance with the plaintiff's contentions, violates the United States Constitution and is, therefore, invalid.

(a) The constitutional questions are still in the case.

If this court, contrary to the Trial Court, should accept the plaintiff's contentions that under the local Idaho law appellant is entitled to recover, then it is appropriate to again raise the constitutional questions raised by the defendants below (R. 55, 114).

The case of *Ware v. The Travelers Ins. Co.*, 150 F. (2d) 463, was decided on a motion to dismiss, unaided by an interpretation of the local Idaho law, and unaided by a consideration of how the statute actually operates in practice. At the time of the decision by the Circuit Court of Appeals, the important cases of *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 90 L. ed. 1023, 66 S. Ct. 1142; *Robertson v. People of the State of California*, 328 U.S. 440, 90 L. ed. 1040, 66 S. Ct. 1160; *Freeman v. Hewit*, 329 U.S. 249, 91 L. ed. 265, 67 S. Ct. 274, and other cases had not been decided. Had they been decided, the decision of the Circuit Court of Appeals might well have held Section 40-902 vulnerable to the XIVth Amendment to the Federal Constitution and to the Commerce clause.

The doctrine of the law of the case is not an absolute rule of law, but merely one of practice, procedure

and convenience. *Messinger v. Anderson*, 225 U.S. 436, 32 S. Ct. 739. Nor does the doctrine bar the appellate court from passing on questions not considered in the prior appeal. *Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129, 41 S. Ct. 276. Especially is this true where substantially different facts are presented at the second trial. *Mitchell v. Reolds Farms Co.* (Mich.) 247 N.W. 89. The doctrine may be disregarded by the appellate court if it believes its prior decision to be palpably erroneous. *American Surety Co. of N. Y. v. Bankers' Savings & Loan Assn. of Omaha, Neb.* (C.C.A. 8) 67 F.(2d) 803. Certainly an appellate court upon second appeal is not bound by a proposition of law laid down in a prior appeal where a contrary rule has been announced by the Supreme Court of the United States after the first appeal. *Pacific American Fisheries v. Hoof* (C.C.A. 9) 291 Fed. 306; *American Surety Co. v. Bankers' Savings & Loan Assn.*, *supra*. We believe, for example, that the case of *Robertson v. People of the State of California*, 328 U.S. 440, 90 L. ed. 1040, 66 S. Ct. 1160, decided since the first appeal in the *Ware* case, announces principles which demonstrate the unconstitutional character of the statute involved.

(b) *The statute conflicts with the XIVth Amendment.*

Before the constitutionality of Section 40-902 can be passed upon, we must first know what the statute is and means. If the statute means what the plaintiff claims it means, so as to entitle the plaintiff to recover commissions, then it is assumed that the statute means: (1) that Section 40-902 applies to insur-

ance proposals originating and negotiated outside the state of Idaho; (2) that "full commission" payable to a countersigning agent means commissions customarily paid in Idaho or, alternatively the same commission as would be payable to a producing agent if he produced the business; (3) that a commission is payable even though the policies are written on a no-commission basis under the War Projects Rating Plan; (4) the obligation to pay a countersigning agent applies only to a foreign insurance company; (5) a foreign insurance company cannot agree with a countersigning agent relative to the compensation to be paid him for his countersigning services; (6) the countersigning agent had no right to share the full commission or to make any arrangements with respect thereto, even though the statute did not prohibit him from so doing; (7) the countersigning agent has a direct cause of action for "the full commission."

The following features of Section 40-902 are now to be noted:

1. It applies *only* to foreign insurance companies.
2. Domestic insurance companies need not have policies countersigned.
3. No service is required of a countersigning agent other than the ministerial act of countersigning (R. 89); *i.e.*, (1) no approval of the risk is required (provision as to approval of risk having been eliminated in 1915 by Chapter 145, Idaho Laws 1915, p. 318); (2) no record of policies countersigned need be kept or furnished to any state insurance authority. (Under the statute effective July 1, 1947, important services are required of the countersigning agent) (App. 6).

4. The statute is not related to and is in no way necessary to a proper administration of the other regulatory provisions of the Idaho law.

5. The period involved, during which the cause of action allegedly arose, is prior to the enactment of the McCarran Act, by which Congress empowered states to regulate insurance in their respective states.

The following additional comments should be borne in mind if the statute means what the plaintiff claims it means:

1. Countersignature is mandatory, whether the policies be written pursuant to negotiations originating outside or within the state of Idaho.

2. The sole beneficiary of the statute is the countersigning agent; in countersigning he performs no function in the Idaho insurance system. He neither services the policies he countersigns nor protects the revenues of the state.

3. The net effect of the statute in practice is to favor domestic insurance companies and discriminate against foreign insurance companies in the writing of insurance on risks located in Idaho because the foreign insurance company must pay a commission to the producing agent and another "full commission" to the countersigning agent, whereas a domestic insurance company need pay a commission only to a producing agent.

4. The countersignature commission requirement therefore constitutes a bald exaction for a trifling service directed solely against a foreign insurance company as to policies made, written or placed outside the state of Idaho.

5. The net effect of the statute in practice is to prohibit a foreign company from writing insurance outside of Idaho on risks located in Idaho.

Bearing in mind the several features of the Idaho statute as discussed above, we turn to a consideration of the applicable constitutional principles involved. The Constitution, being the "supreme law of the land" (Article VI, Clause 2), invalidates Section 40-902 if it deprives the defendants of their liberty or property without due process of law or denies the defendants equal protection of the law (Constitution, XIVth Amendment, Section 1).

Hyatt v. Blackwell Lumber Company, 31
Ida. 452, 173 Pac. 1083 (1918) 1 A.L.R.
1663;

Liggett Co. v. Baldridge, 278 U.S. 105, 73
L. ed. 204, 49 S. Ct. 57;

*Northwestern Natl. Ins. Co. of Milwaukee,
Wis. v. Lee*, 49 F.(2d) 274 (3-Judge court
sitting in Oregon) affirmed sub. nom.
*Averill v. Northwestern Natl. Ins. Co. of
Milwaukee* (Wis.) 284 U.S. 590, 76 L. ed.
509, 52 S. Ct. 139;

2 Cooley's Constitutional Limitations, 8th
ed., p. 1229;

23 Am. Jur. p. 230, Secs. 259, 265, 275;

11 Am. Jur. p. 646, Sec. 40 *et seq.*, p. 995,
Secs. 261, 262, 263;

12 Am. Jur. p. 134, Sec. 472.

*Robertson v. People of the State of Califor-
nia*, 328 U.S. 440, 90 L. ed. 1040, 66 S. Ct.
1160, 1163.

In the case at bar, a violation of both the due process and equal protection clauses exists. Section 40-902 is arbitrary in that it compels a foreign insurance company under the statute as claimed applicable to the facts of this case to pay a resident of Idaho for services which he does not in fact render and is not required to render, the payment being wholly out of proportion for the mere ministerial and trifling act of affixing his signature. In addition, the statute operates unequally, without any basis in reason for the classification, the countersignature requirement being imposed upon the foreign insurance company only and not against the domestic insurance company. (See especially the *Hyatt* and *Northwestern* cases, *supra*.)⁷

The appellant relies on *Osborn v. Ozlin*, 310 U. S. 53, 84 L. ed. 1074, 60 S. Ct. 758, upholding the validity of the Virginia resident agency law, and *Holmes v. Springfield Fire and Marine Ins. Co.*, 311 U. S. 726, 85 L. ed. 473, 61 S. Ct. 129, upholding the validity of the Montana law.

We have heretofore pointed out the important dis-

⁷See also *Allgeyer v. Louisiana*, 165 U.S. 578, 41 L. ed. 832, 17 S. Ct. 427; *New York L. Ins. Co. v. Head*, 234 U.S. 149, 58 L. ed. 1259, 34 S. Ct. 879; *Aetna L. Ins. Co. v. Dunken*, 266 U.S. 389, 69 L. ed. 342, 45 S. Ct. 129; *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 70 L. ed. 664, 46 S. Ct. 331; *Home Ins. Co. v. Dick*, 281 U.S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701; *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928; *Boseman v. Connecticut General L. Ins. Co.*, 301 U.S. 196, 81 L. ed. 1036, 57 S. Ct. 686, 110 A.L.R. 732.

tinguishing differences between the Idaho statute here involved and the Virginia and Montana statutes there involved. (See Br. 31, *supra*).

There is an additional reason supporting the contention that Section 40-902 violates the due process clause. The Supreme Court has held that a corporation cannot, in view of the due process clause, be prevented from employing and paying those whom it needs for its business outside the state, even though with reference to state insurance risks. (*Fidelity and Deposit Co. of Maryland v. Tafoya*, 270 U. S. 426, 70 L. ed. 664, 46 S. Ct. 331.) What it cannot do directly, a state cannot do indirectly. Otherwise, there would be little protection for a constitutional right (*Fidelity and Deposit Co. of Maryland v. Tafoya*, *supra*). If, under Section 40-902, the defendants are required to pay the "full commission" to the resident agent, they cannot pay any commission to the agent that produces the business. On the other hand, if it is argued that the defendants can pay a commission to the producing agent but are required to pay the same commission to the countersigning agent and that therefore there is no prohibition within the meaning of the *Tafoya* case, the effect is just as bad, because the defendants cannot compete with a domestic company in writing insurance policies on Idaho risks. Commissions must be included in the premiums charged. If a foreign insurance company must pay two full commissions, whereas a domestic company need pay only one, a foreign company is in no position to quote competitive rates. Accordingly, Section 40-902 denies the

defendants due process.⁸ Again, if Section 40-902 means that the entire commission must be paid to the countersigning agent and therefore nothing to the producing agent, the statute denies defendants due process under the doctrine of the *Tafoya* case, and the statute is void.

In the opinion in the case of *Ware v. The Travelers Ins. Co.*, *supra*, the *prima facie* constitutionality of the Idaho statute was upheld on the strength of the *Osborn* and *Holmes* cases, both of which have been distinguished above, but in doing so, the court did not take into account the meaning of the Idaho statute as now construed. Now the court can determine the constitutionality of the statute in light of its true meaning.

(c) The statute conflicts with the commerce clause of the United States Constitution.

In the case of *U. S. v. S. E. Underwriters Assn.*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. ed. 1440, the court, for the first time, held that the business of insurance constitutes interstate commerce. Under the

⁸In *Potomac Fire Insurance Company v. State*, 18 S. W.(2d) 929, 933, it is stated that:

“The expense of agents’ commissions is the largest single item of expense in the business of insurance.” In *O’Gorman & Young v. Hartford Fire Insurance Company*, 282 U.S. 251, 75 L. ed. 324, 328, it is said that: The agent’s compensation, being a percentage of the premium, bears a direct relation to the rate charged the insured. The percentage commonly allowed is so large that it is a vital element in the rate structure and may seriously affect the adequacy of the rate. Excessive commissions may result in an unreasonably high rate level or impairment of the financial stability of the insurer.”

McCarran Act (approved March 9, 1945) Congress empowered the states to regulate and tax the business of insurance. In *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, 90 L. ed. 1023, 66 S. Ct. 1142, the court was called upon to pass on the validity of the South Carolina statute imposing a gross premium tax upon a foreign insurance company, there being no similar tax placed upon a domestic insurance company. In upholding the statute, the court relied solely upon the provisions of the McCarran Act, which authorized the difference in treatment taxwise imposed by the state. In the companion case of *Robertson v. People of the State of California*, 328 U. S. 440, 90 L. ed. 1040, 66 S. Ct. 1160, the court upheld the California statute prohibiting any insurance company not on a legal reserve basis from engaging in interstate commerce through local agents in writing risks on persons located in California. The McCarran Act was not involved, the cause of action having accrued prior to the passage of that Act. The court was careful to note, however, in the course of its opinion, that the California statutory requirements applied to all insurance companies, whether domestic or foreign (See L. ed. pp. 1043, 1044, 1045, 1047, 1048, and 1050). On p. 1050 the court said:

“Here California’s reserve requirements for securing authority to do business cannot be held, either on the face of the statute or by any showing that has been made, to be excessive for the protection of the local interest affected; or designed or effective either to discriminate against foreign or interstate insurers or to forbid or exclude their activities, by all who are able and

willing to maintain reasonable minimum reserve standards for the protection of policyholders.”

It is to be noted, therefore, that the test to be applied is whether Section 40-902 can be said to be “*excessive for the protection of the local interest affected,*” or if the statute is “*designed or effective either to discriminate against foreign or interstate insurers or to forbid or exclude their activities.*”

It is apparent from what has already been said that Section 40-902 is both excessive and discriminatory. It is excessive because it constitutes a bald exaction for a trifling service, with no protection to the state resulting therefrom or to its insurance system—unless it be a statute enacted for the benefit of the counter-signing agent alone. The statute is discriminatory because it discriminates—on its face as well as in practice—against a foreign insurance company only, leaving the domestic company free of the burden thus imposed upon the foreign company (R. 90). In recent years the Supreme Court has reaffirmed the constitutional necessity of not burdening or discriminating against interstate commerce. In *Best & Co., Inc. v. Maxwell*, 311 U. S. 454, 61 S. Ct. 334, the court said, at p. 335:

“The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.”

In that case, a North Carolina statute required one not a regular retail merchant to obtain a \$250 license

to enable him to display goods for purposes of securing orders for retail sales. A New York merchandising establishment rented a display room for several days and took orders for goods corresponding to samples, which orders were filled by shipping to customers from New York City. The regular North Carolina merchants were subject only to a \$1 license tax for the privilege of doing business. The effect of this discriminatory treatment was to favor local merchants against foreign merchants and undoubtedly increased the economic welfare of the local merchants. In holding that the statute was in violation of the commerce clause, the court noted the competitive situation as between domestic and foreign merchants, and said (p. 335):

“Interstate commerce can hardly survive in so hostile an atmosphere. A \$250 investment in advance, required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market * * * North Carolina regular retail merchants would benefit, but to the same extent the commerce of the Nation would suffer discrimination.

“The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.”⁹

⁹See also *Northwestern Nat. Ins. Co. v. Lee*, 49 F. (2d) 274, affirming *sub. nom. Averill v. N.W. Nat.*

Another case calling attention to the fact that a state statute enacted for the local economic welfare of a class of persons within the state does not thereby void the invalidating effect of the commerce clause is *Baldwin v. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497. In that case, a provision of the local milk control act prohibited a dealer from selling within the state, milk produced without the state where such milk was purchased from the producer at less than the minimum price fixed for similar milk produced within the state. A dealer brought wholesale milk from Vermont into New York and there sold it in the original cans. In holding that the state statute was unconstitutional as an undue burden on interstate commerce, Judge Cardozo said, at 55 S. Ct. p. 500:

“The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk; the supply being put in jeopardy when the farmers of the state are unable to earn a living income * * * Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to com-

Ins. Co., 284 U.S. 590, 76 L. ed. 509, 52 S. Ct. 139, heretofore discussed. Also *Best & Co., Inc. v. City of Omaha* (Neb.) 33 N.W.(2d) 150, decided June 29, 1948.

merce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”

Then, discussing a number of decisions showing permissible regulations, the court concluded, at p. 501:

“None of these statutes—inspection laws, game laws, laws intended to curb fraud or exterminate disease—approaches in drastic quality the statute here in controversy which would neutralize the economic consequences of free trade among the states.”¹⁰

In *Southern Pac. Co. v. State of Arizona*, 325 U. S. 761, 65 S. Ct. 1515, the court held invalid under the commerce clause the Arizona train limit law, limiting passenger trains to fourteen cars and freight trains to seventy cars. The court said, at p. 1525:

¹⁰See also *Nippert v. Richmond*, 326 U.S. 416, 66 S. Ct. 584 (1946), invalidating tax (as an undue burden on interstate commerce) imposed on sales solicitors for out of state concerns.

“The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by ‘simply invoking the convenient apologetics of the police power’.”¹¹

In *Edwards v. California*, 314 U. S. 160, 62 S. Ct. 164, the court held a California statute violated the commerce clause by making it a misdemeanor to bring or assist in bringing in to the state an indigent non-resident, the local welfare not being a sufficient excuse.

In *Freeman v. Hewit*, 329 U. S. 249, 67 S. Ct. 274, the court invalidated the Indiana gross income tax Act of 1933, calling attention to the fact that the commerce clause, even without implementing legislation by Congress, is a limitation upon the power of states forbidding the state from singling out interstate commerce for hostile action, and, furthermore, precluding the state from any action which “may fairly be deemed to have the effect of impeding the free flow of trade between states.” The court said (67 S. Ct. p. 277):

“Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own.”

If, therefore, the commerce clause is effective to

¹¹*Morgan v. Commonwealth of Virginia*, 328 U.S. 373, 90 L. ed. 982 (1946) 66 S. Ct. 1050, invalidating state statute requiring segregation of passengers on trains.

strike down a statute passed for the purpose of protecting the local economic welfare—whether it be by taxation, or protection against nonresident indigent immigrants, safety of train operation within the state, or protection of local commerce against the competition of foreign commerce—surely a state statute which has for its sole function and purpose the arbitrary enrichment of a local resident at the expense of foreign commerce will likewise be struck down.

In the *Ware* case, the court, at 150 F.(2d) p. 464, treats Section 40-902 as a valid regulation of interstate commerce by reason of what is characterized as “the local servicing of policies” because “intimately bound up with the state’s program for the security and welfare of workmen.” The court cites, in a footnote, the statutes of Idaho which it believes impose this local servicing obligation. Reference to the statutes (40-508, 40-902, 40-903, 43-1601, 43-1604, 43-1605 and 43-1606) (App. 22-3) *fails to reveal a single statute that imposes upon a countersigning agent the duty of servicing the policies countersigned*. The protection of workmen is achieved by the bond and the servicing of claims within Idaho under the Workmen’s Compensation Act is subject to approval of awards by the Board and to the licensing of adjusters. The countersigning agent has nothing whatsoever to do in this process (Finding XI, *n*, R. 89). The evidence in this case shows that Mr. Ware performed no service whatsoever in the servicing of the policies involved or in connection with the claims under those policies. Mr. G. M. Jordan, the defendants’ Claims Department representative, testified fully as to how

the policies were serviced and how claims were taken care of (R. 232, *et seq.*). As a matter of fact, the claims involved required servicing in all parts of the United States. Obviously, Mr. Ware or any other countersigning agent couldn't possibly have had the facilities to service any such claims (R. 236). As stated by Mr. Jordan (R. 234-5):

"At one time there was better than twenty-five thousand coming from all over the United States, and they started to dissipate all over the United States because of injury, and it was necessary to service their claims, and we referred the claim to the nearest offices to their home. We just followed the men."

Admittedly, a state may regulate either the intra-state or interstate aspects of the insurance business, but, as pointed out in the case decided since the *Ware* case, namely, *Roberston v. People of the State of California*, 328 U.S. 440, discussed *supra*, permissible regulation must not be "excessive for the protection of the local interest affected; or designed or effective either to discriminate against foreign or interstate insurers or to forbid or exclude their activities."

The effect of Section 40-902 as construed by the plaintiff is to bar out-of-state insurers from competing with domestic insurance companies, as to policies made, written and placed outside of Idaho on Idaho risks, because the foreign insurance company must pay a countersignature commission when none is payable by a domestic company. *The court below in effect found the existence of discrimination against interstate commerce* (R. 89-90).

The Idaho statute, when tested by the rule of the *Robertson* case, is clearly in conflict with the test thus proposed, and, therefore, in violation of the commerce clause.¹²

It is respectfully submitted, therefore, that Section 40-902, if construed in accordance with the contentions of the plaintiff in light of the applicable constitutional principles—particularly the cases most recently decided—violates the Federal Constitution and is void. If void, the plaintiff has no basis for recovery.

7. Reply to appellant's brief.

(a) Criticism of appellant's statement of the case.

Unfortunately, appellant's statement of the case (Ap. Br. 1 to 18) is inadequate, incorrect and biased. At least twenty-seven illustrations are available to show this. To avoid unduly prolonging this brief, we call attention only to the following:

(Ap. Br. 5) Appellant is critical because appellees did not accept appellant's abbreviated record. Appellant's abbreviated record in light of the statement of

¹²The protection afforded by the XIVth Amendment is, as pointed out above, an additional reason for the statute's invalidity because, as stated in *Mayer v. State of Nebraska*, 262 U.S. 390, 43 S. Ct. 625, the liberty protected by constitutional Amendment XIV "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." In Cooley's *Constitutional Limitations*, 8th ed., p. 1236-7, it is stated:

"Freedom is the general rule and restraint can be justified only by exceptional circumstances."

points, as set out R. 266, was an extremely biased and unfair document. A careful analysis made by us of that record showed nearly 175 items that would have required correction in the judgment of the appellees in order to present a fair statement of what occurred at the trial below. Under the rule, appellees had no other alternative but to demand a complete record. If there is any incidental duplication resulting from that demand it was caused by the biased and unfair abbreviated record submitted for approval.

(Ap. Br. 6) The purported summary of the \$5 per month countersigning contract is inadequate and inaccurate. The court's finding on the matter (R. 87 and Finding IX) based on evidence, as for example Exhibits 6, 7, 22 is ignored.

(Ap. Br. 6) Appellant's quotation of Ex. A-2 with portions which appellant italicises constitutes a misconstruction of Ex. A-2 directly contrary to the finding of the court (Finding VI, *n*, R. 86).

(Ap. Br. 7) Appellant's discussion of Exh. 1 will be dealt with hereinafter in which the evidence showing that the War Projects Insurance Rating Plan endorsement was attached to the policy and was part of it from the beginning will be reviewed. Furthermore, the court so found (Finding VI, *n*, R. 82):

“That by the terms of the aforesaid Plan the Comprehensive Insurance Rating Plan Endorsement was issued and formed a part of insurance policies issued under such Plan.”

The attempt to summarize Mr. Peterson's testimony is very unfair as will be shown in connection with the

discussion of the evidence showing that the endorsement was on the policy when it was issued.

(Ap. Br. 8) Oscar W. Nelson was not produced by defendant, as stated in appellant's brief, but was produced as a witness on behalf of appellant by appellant. Appellant omits the vital part of the witness Nelson's testimony elicited on cross-examination: That it is customary practice in Idaho for insurance commissions to be regulated by contract (R. 112) and that the rate of commission varies with the size of the policy or risk; that it goes down as the size of the risk goes up and that it varies with the various companies (R. 111). The court found that compensation to procuring agents is customarily fixed by contract between the insurance carrier and the agent on terms and conditions mutually satisfactory to each (Finding XIII, *n*, R. 90).

(Ap. Br. 8) Appellant ignores entirely the record of R. 115 to 130 dealing with admissions made by appellant dealing with Exhibits 6 to 17, inclusive, dealing with the \$5 per month checks, the \$5 per month letter, various documents involved with respect to the War Projects Insurance Rating Plan; letters dealing with the taxes paid on premiums returned to the Idaho authorities.

(Ap. Br. 8 and 9) Appellant ignores Mr. Peterson's testimony as to the origin of the three policies written under the Plan (R. 137). At the top of page 9 appellant cites certain sections of the statute. The witness made no attempt so to do and these sections of the statute do not embody the administrative practice to which he testified.

(Ap. Br. 9) Appellant characterizes the plan as a scheme for big companies to get the insurance business theretofore obtained by nonstock companies. The Government was attempting to get insurance at cost and without profit to the insurance carrier and to avail itself of the facilities of both stock and nonstock companies. The plan was practically world-wide in operation (R. 133 to 137). See discussion *infra*. There is also an inference that the witness was unethical in participating in the administrative committee set up by the War Department at the same time being secretary of the defendant companies. Appellant's statement ignores the fact that the committee on which the witness served was set up by the War Department (R. 136, 199) and expressly provided for representatives from mutual and stock companies. The witness merely represented the defendants. Other persons represented other companies (R. 200). There is also a sly inference of impropriety in the statement that the witness contacted officials in Washington, D. C., about this business. So far as concerns contacting the government, the contact was only for the purpose of getting information necessary to bid on the insurance (R. 139).

(Ap. Br. p. 11) Appellant ignores testimony that if the business had been made, placed and written in Idaho, the agent couldn't have gotten a commission under the Plan (R. 172). Appellant fails to point out that the testimony is that the defendant's countersigning practice was to require countersignature irrespective of local law (R. 173) (Ap. Br. p. 11). Appellant's reference to Exh. A to 0 merely shows

the relationship between the insurance advisor and the insurance company after the insurance was written. The criticism about the advisor's representative being also on the payroll of the Walter Butler Company is intended merely to again muddy the waters. There is no evidence that the defendants had anything whatsoever to do with that fact, nor is there any evidence that the Walter Butler Co. and the Acme Brokerage Co. weren't aware of and disapproved the arrangement (Ap. Br. 11). Appellant's statement concerning why the insurance company wrote the policy and the indemnity company put up the bond is incorrect. The testimony is that the writing of the bond was done pursuant to the requirements of law. There is no requirement of law relating to the writing of a compensation policy.

(Ap. Br. p. 13) Appellant's discussion of Exh. 7 ignores Exh. 22, (R. 162). Appellant's discussion of the payments ignores the fact that there were as many checks as there were months in which Ware countersigned (Exh. 6) and that the court found (Finding IX, R. 88) "That the said Eugene H. Ware has been paid in full by defendant for the countersigning services by him rendered."

(Ap. Br. pp. 15, 16) Appellant's summary of Mr. Jordan's testimony ignores his testimony that Ware had nothing to do with servicing the policies involved (R. 234). The court so found (Finding XI, *n*, R. 89).

(Ap. Br. pp. 16, 17) Appellant's summary of Mr. Nelson's testimony ignores his testimony that only 10% was paid to the producing agent, 17½% payable to the general agent, being inclusive of that amount

(R. 263, 264) (Ap. Br. 17). Appellant's summary of the court's opinion is wholly inadequate picking out certain parts of that opinion and making no attempt to show the court's final findings and conclusions with respect to certain items contained in that opinion.

The foregoing review shows that the appellant's statement of the case wherever made must be received with extreme caution.

(b) Contentions considered.

Appellant interweaves various contentions under various headings and from time to time repeats her argument. It is our intention to answer each of the arguments advanced by discussing them under separate headings. Accordingly, this we proceed to do.

1. The contention that salaried agents are prohibited by Idaho Statute.

Appellant contends (Ap. Br. 19) that the Idaho Statute provides that it is only the one who gets a commission who can countersign. He relies solely upon *Osborn v. Ozlin*, 27 F. Supp. 71, to support this contention. However, that case dealt with the Virginia Statute, Sec. 4222. *Unlike* the Idaho Statute, the Virginia Statute contains the following express provision:

“No state agent, special agent, company representative, salaried officer, manager or other salaried representative of any regularly authorized insurance company, except a mutual insurance company, shall countersign any contract of insurance or surety * * * covering persons or property in this state.”

Obviously, the *Osborn* case does not support appellant's position as to the meaning of the Idaho law.

Under the Idaho law an insurance agent may be either a salaried or commissioned agent (Sec. 40-905, Br. p. 17, 15). The method of compensation is not regulated by statute and is left to the parties to determine by their agreement (R. 90).

While it is true that Sec. 40-902 provides for the payment of "the full commission" in the field in which it operates, that merely means "the full commission, if any" (See Br. pp. 16-23, *supra*). In fact, a number of foreign mutual companies in Idaho write policies through salaried agents (R. 182-186, 246-254, 262, 263). Consequently, both the interpretation of the statute and the actual practice show quite clearly that the Idaho law permits salaried agents both to write insurance and to countersign where the Idaho statutes are applicable.

2. The contention that all questions have been resolved in plaintiff's favor by the case of *Ware v. Travelers Ins. Co.*, 150 F.(2d) 463.

Appellant's contention (Ap. Br. 26, 27) that all questions here involved have been decided in appellant's favor in the case of *Ware v. Travelers Ins. Co.*, 150 F.(2d) 463, was advanced below and expressly rejected by the trial court (R. 72).

3. The contention that the contract of October 1, 1936, fixes the rate of recoverable commission.

Appellant contends (Ap. Br. 35, 36) that the October 1, 1936, contract fixes the rate of commission in the case of workmen's compensation policies to

10% of the premium. We have heretofore called attention to the fact (Br. p. 11, *supra*) that the basic agency contract (Exh. A, R. 16-21) was amended, effective June 1, 1940 (Exh. A-2, R. 23) to provide that upon the occurrence of any one of three different conditions, namely, (1) on risks, written on a retrospective or special commission basis, (2) on risks, or portions of risks, which are in states other than that indicated in the territory described in your agency agreement, and (3) on bonds involving execution or countersignature by another agent "the commissions which you may retain out of premiums paid to the company will be fixed on the basis of the individual risk, anything in your agency agreement to the contrary notwithstanding."

Appellant contends (Ap. Br. 35, 36), that Exhibit A-2 is inapplicable here because it is to be read so as to confine the type of retrospective or special commission risks to those risks, or portions of risks, "which are in states other than that described in your Agency Agreement."

Such a reading ignores the plain meaning of the contract. Had appellant's construction been intended, no comma would have been placed after the word "basis."

Furthermore appellant's interpretation creates two absurdities: (1) on retrospective or special commission basis risks Ex. A-2 would apply only on that minor part of such business which is located, in whole or in part, outside of the agent's territory, even though there is just as much reason—because of the reduced over-all premium on such risks—for Ex. A-2 to apply within his territory; and (2) Ex. A-2 would

be limited so as to apply only to retrospective or special commission basis risks, even though there is just as much reason under Appellant's own reasoning to apply it to prospective risks, and notwithstanding the fact that a statute might fix the commission in the state wherein the risk or portion thereof was located.

The obvious meaning of Ex. A-2 is (1) that it applies to all risks written on a retrospective or special commission basis, whether located within or without the agent's territory, and (2) that it applies to all risks or portions thereof, retrospective or prospective, which are outside of the territory described in the agent's contract. The Trial Court's findings support appellees' position (R. 86).

4. The contention that "full commission" means the commission payable if the insurance was procured by Ware and written without the War Projects Insurance Rating Plan.

We have heretofore pointed out that the phrase "the full commission" contained in Section 40-902 means the full commission, if any there be payable in connection with the securing of insurance proposals. It does not mean contract commission or customary commission, especially if there is no evidence of contract commission or customary commission (Br. p. 21, *supra*). We have also pointed out that the Montana Attorney General's interpretation of the Montana law referred to in *Springfield v. Fire & Marine Ins. Co.* is not a correct construction of the Idaho law; but even if it were, had Ware produced the business, no commission would have been payable because the policies were written under the War Projects Insur-

ance Rating Plan (R. 172). In the *Holmes* case an actual 10% commission was payable and paid to an outside agent. In this case no commission was payable or paid on policies written under said rating plan.

Appellant cites a number of cases purporting to support her position as to the meaning of "full commission." Actually the cases do not involve interpretation, but rather constitutionality of the statute involved in such cases (Ap. Br. 30, 32, 55, 56). Also cited are decisions holding that laws existing at the time of making of a contract are read into it. We do not disagree, nor did the trial court disagree (R. 76). The court said (R. 75-6):

"* * * the Court is unable, after reading the statute into and making it a part of the contract, which provides that he shall have the full commission when the premium is paid, determine what, if any, commission could be allowed when no commission is agreed upon and no commission is paid."

Appellant suggests in passing that in any case he is entitled to 5% of the premium (Ap. Br. 30). He apparently now relies on that section of the statute which provides that when a policy is made, written or placed by a licensed broker, the contracting agent shall receive a commission of not less than 5% of the premium paid (R. 71).

In the court below the court said concerning this section of the statute (R. 71):

"(The part underlined is the amended portion of the Statute and plaintiff alleges in his complaint that the policies 'were submitted to the plaintiff by the defendants and not through a

licensed broker,' and agrees that the amended portion of the statute has no application here.)”

Appellant apparently abandons the concession he made below and now contends that the section does have application. Not only, however, is there no evidence that the policies were submitted by a licensed broker, the complaint is on a precisely opposite theory (R. 87, Finding VIII, *n*). Furthermore, the only licensed brokerage law in Idaho at the time that the policies were countersigned were fire insurance brokers. Since there is no fire insurance policy involved, it is obvious that the statute has no application (See p. 24, *supra*).

5. The contention that the War Projects Insurance Rating Plan was inapplicable and illegal.

The court below found it unnecessary to pass upon the legality of the War Projects Insurance Rating Plan. As he construed the statute. the plaintiff had no cause of action. It thereupon became unnecessary to determine whether or not the War Projects Insurance Rating Plan was legally valid. Furthermore, he might have had in mind the fact that the right of an agent to compensation is derivative depending upon the transaction actually entered into or recognized by his principals.

See

MacGregor v. Persha (Minn.) 218 N.W. 463;
Lawson v. Black Diamond Coal Mining Com-
pany, 53 Wash. 614, 102 Pac. 759.

The state was asserting no objection nor were the parties to the insurance contract asserting any objection. If commissions were payable they were payable

on the transaction actually consummated, not upon a transaction not consummated.

Analogies make this principle plain. Thus, where parties treat a transaction as valid even though it is invalid under the statute of frauds, the broker is entitled to a commission. *Dworski v. Lowe* (Conn.) 92 Atl. 112. Or where policies are cancelled, the agent's commission is not based upon the original premium charged and paid, but upon the amount of earned premium.

National Union Fire Ins. Co. v. Nevils (Mo.)
274 S.W. 503;

Independent Indemnity Co. v. Dreyfus (C.
C.A. 6) 49 F.(2d) 599;

*Union Mut. Casualty Co. v. Insurance Budget
Plan, Inc.* (Mass.) 195 N.E. 903;

Aetna Life Co. v. Moser, 189 Wash. 521, 65
P.(2d) 1277.

Indeed, appellant's contract so provides (Par. 5, R. 18).

See also the analogy. *Commissioner of Internal Revenue v. Bradley* (C.C.A. 6) 56 F.(2d) 728.

The court correctly held that the plaintiff had no cause of action and that it was, therefore, unnecessary in this case to consider the question of the legality of the plan.

However, in view of the appellant's claim that the War Projects Insurance Rating Plan was inapplicable and illegal, we deem it helpful to consider that contention.

(1) Background and development of War Projects Insurance Rating Plan.

Stock casualty companies, as a rule, solicit their regular business through licensed agents and brokers who are generally recompensed for their services in the production of business, by a commission which is generally a percentage of the premium and they are sometimes recompensed for other services by flat amounts. Most of the large mutual casualty companies which are the writers of large workmen's compensation and automobile and general liability risks solicit their regular business through licensed agents who are salaried employees and who are recompensed through salary for their services in the production of business.

Previous to the adoption of the War Projects Insurance Rating Plan, the United States Navy and the United States War Department and other governmental agencies had been compelled to require that prime contractors on cost-plus-a-fixed-fee projects get four bids for the insurance required, two from stock companies and two from mutual companies. The prime contractor on each project was then required to place his insurance in the lowest bidding company (R. 134). There were two serious evils in this previous plan. One was that the contractor could not select the carrier which he believed was well suited or best suited to handle the insurance for his project and was compelled instead to use a carrier, even though that carrier was totally unqualified for the job, if the bid of that carrier were the low bid. The second was that at a time of greatest need a considerable part of the total insurance resources of the country might have

been unavailable because of a price differential, no matter how small or how large.

Many of the cost-plus-a-fixed-fee projects of the various governmental agencies were vast in size. Geographically they were located wherever in the United States and elsewhere in the hemisphere or throughout the world that the Navy and the Army and the other governmental agencies placed them (R. 133). In total they demanded all of the facilities of all casualty companies, both stock and mutual, which had strong and far reaching engineering and claim service organizations which were equipped to handle safety problems and compensation claims and other claims whether the claims were made at the site of the project or whether the claims had to be serviced anywhere in the United States or elsewhere in the world.

In order to make all insurance facilities available and to eliminate price differentials, the War Projects Rating Plan was developed and promulgated by the United States Navy, by the United States Army and other Government agencies (See Def. Ex. 18, R. 155).

The Plan was adopted for use solely in connection with projects which the United States Navy and other governmental agencies contracted for on a cost-plus-a-fixed-fee basis with the prime contractors. The Plan adopted provided for the placing of this insurance on a cost-plus-a-fixed-charge basis. The Plan as so promulgated stipulated what elements of cost were to be included in the computation of the final earned premium. No provision was made in that premium for any profit whatever for the insurance carrier.

No provision was made in that premium for any commission or salary to be paid to any agent or broker. Parity of price was established for all carriers irrespective of whether they were stock or mutual. Thus, the total resources of the casualty insurance business were made available to the war effort (R. 135).

The Plan also provided that the prime contractor should employ the services of an insurance advisor. The Plan stipulated that it was not necessary that this advisor be an insurance agent. The Plan further stipulated that the duties of the advisor included the checking of all policies and endorsements issued by the carrier, the checking of all classifications and rates used in the determination of the standard premium, the checking of losses incurred and the checking of the computations of the preliminary earned premium and the final earned premium. The fees for this service were stipulated in the Plan. The fees were payable by the contractor to the advisor. They were not incorporated in and had nothing to do with the provisions of the Plan under which the contractor was obligated to the insurance carrier for the premium the Plan (R. 156).

The Plan stipulated that the following endorsements developed in accordance with the requirements of the plan be attached to the policies.

(a) *Workmen's Compensation Policies.*

- (1) War Projects Insurance Rating Plan Endorsement (Endorsement 3016 on Policy WUB-863386).
- (2) General Endorsement for Workmen's Compensation and Employers' Liability policy (Endorsement 3013 on Policy WUB-863386).

(b) *Automobile Liability Policies.*

General Endorsement for Automobile Liability policy (Endorsement 3015 on Policy WSLA-863388).

(c) *General Liability Policies.*

General Endorsement for General Liability policy (Endorsement 3014 on Policy WSLG-863387).

Paragraph 1 of each of the General Endorsements stipulated that the insurance was to apply to the prime cost-plus-a-fixed-fee subcontractors engaged by the prime contractor on the project.

Paragraph 7 of the General Endorsement for Automobile Liability policies and Paragraph 11 of the General Endorsement for General Liability policies provided, respectively, that the final earned premiums for these policies were to be determined in accordance with the provisions and requirements of the War Projects Insurance Rating Plan Endorsement forming a part of the Standard Workmen's Compensation and Employers Liability policy.

In that way the determination of the final earned premium for the three policies was brought together as a composite unit under the terms of the War Projects Insurance Rating Plan endorsement forming a part of the Workmen's Compensation policy.

The War Projects Insurance Rating Plan embodies retrospective rating (R. 133) which is a sound rating principle. Such rating is used when the individual risk is large enough to warrant its use and when it is desired that the final earned premium on the risk involved be determined at the end of the policy period

upon the basis of cost. In most retrospective rating plans charge is generally included for the payment of acquisition expense though invariably on a scale greatly reduced from that applicable to smaller risks written at prospectively determined premiums or rates. That was why Mr. Ware's agency contract (Exh. A-2) specified that with respect to any business procured by him, which was written on a retrospective basis, the commissions which might be retained by him, as otherwise specified in his agency contract, were not applicable. In most retrospective rating plans, provision is also made for some profit to the carrier.

On a risk so very great in size as was the Farragut Naval Training Station project it was actuarially sound and it served the best interests of all concerned to have the rating plan developed upon a basis which would give recognition to the various kinds of losses covered by the several policies, on a composite basis.

The War Projects Insurance Rating Plan Endorsement stipulated that standard premiums be computed under the three policies subject to the plan for the following purposes:

- (a) Determination of the maximum premium
- (b) Determination of the fixed charge
- (c) Determination of the deposit premiums
- (d) Determination of interim premium payments.

The use of standard premiums for such purposes is common to the use of retrospective rating generally. The standard premiums referred to are the premiums determined under the terms of the policy other than the War Projects Insurance Rating Plan endorsement.

The payment of the deposit premium and the payment of the interim premiums were to provide the insurance carrier with interim funds sufficient to meet engineering, claim administrative, general administrative costs and the claim costs during the progress of the work during the policy period.

(2) Legality of the War Projects Insurance Rating Plan in Idaho.

A. The United States Navy required the use of the Plan on this project.

The Bureau of Yards and Docks, Navy Department, required by administrative ruling that the Workmen's Compensation and Employers' Liability, Automobile Bodily Injury Liability, and Property Damage Liability and General Bodily Injury Liability insurance written by the defendants to cover the operations of the Walter Butler Company in the building of the naval base known as the Farragut Naval Training Station in Kootenai County, Idaho, be written in accordance with the requirements of the War Projects Insurance Rating Plan (R. 155).

The United States Navy thus indicated that in its opinion there was nothing in the laws of Idaho which would preclude the use of the War Projects Insurance Rating Plan, without prejudice or embarrassment or harassment to the carrier or to the insured.

B. There is nothing in the laws of Idaho governing casualty insurance premiums or bond premiums or governing commissions payable on casualty insurance or requiring that any percentages of premium be paid to anyone for any services either in the production of or the countersignature of casualty insurance covering risks in Idaho.

It is abundantly clear that the Idaho statutes contain no provisions of any nature whatsoever

- (a) Which govern or determine the premium to be charged for any casualty risk, or
- (b) Which specify that any commission whatsoever is payable on any risk or which stipulate any specific rates of commission of any kind in relation to casualty insurance or bonds, or
- (c) which stipulate that a duly licensed resident agent of Idaho shall be recompensed in any specific or specified manner by an insurance carrier for the services rendered by him either in the production of business or in the servicing of business or for the simple act of countersigning policies, or which stipulate that such agent shall be recompensed by salary or by a certain percentage of premiums as commission or by any combination or variation of such methods, or which forbid such agent and the carrier from making such arrangements as are mutually agreeable to and agreed upon by him for the payment of any percentages of premium or of any specific amounts for various services, be they for the production of business or for other services in relation thereto or for the effortless act of countersignature, or
- (d) which contemplate or sanction so vicious a feather-bedding privilege as the plaintiff seeks

for the brief act of countersignature of three policies and two bonds under the War Projects Insurance Rating Plan (and two policies outside of the Plan), no one of which countersigning acts could have taken more than a few seconds of Mr. Ware's time.

The War Projects Insurance Rating Plan is a reasonable rating plan, for the reasons stated. In the absence of any specific prohibition of the use of this Plan in Idaho by a clear and unambiguous statute, the Plan was appropriately used in Idaho, just as it was throughout the United States, in connection with cost-plus-a-fixed-fee projects under the jurisdiction of the United States Navy, the War Department and the other government agencies hereinbefore referred to.

C. *Section 40-905 of the Idaho Insurance Code does not require that an agent be paid any commission.*

See Brief p. 15, *supra*.

D. *Use of the War Projects Insurance Rating Plan is entirely consistent with the requirements of Section 40-902 of the Idaho Insurance Code.*

(1) *Section 40-902 has no application to insurance policies made, written and placed outside of Idaho.*

We have heretofore pointed out that Sec. 40-902 has no application to insurance policies made, written or placed outside of Idaho (Br. p. 26, *supra*). Assuming arguendo that Section 40-902 does apply to policies made, written and placed in New York, as was the case here, there is nothing in that section which prohibits the use of the plan by foreign carriers.

- (a) *The statute does not stipulate that any specified percentage or amount shall be paid to any agent or broker for the production of the business or for the countersignature of the policies.*

See Brief p. 23, 35, *supra*.

- (b) *Agents and brokers on the one hand and insurance carriers on the other are entirely free, under the Idaho Insurance Code, to make any contracts or agreements mutually acceptable to them for the services performed.*

The trial court so found (R. 90).

- (c) *There is nothing in Section 40-902 which requires that a countersigning agent shall keep any specified amount of commission even when a commission is in fact paid by the carrier for the business. The countersigning agent is entirely free under the statute to remit the entire commission or any part thereof in accordance with any agreement which he may make with the carrier or the producing agent or broker.*

The Idaho Statute in this respect is quite different from both the Virginia and Montana Statutes, each of which regulate the amount of commission that the local agent may retain of commission actually paid. See Section 4226a of Virginia Statutes; *Springfield Fire & Marine Ins. Co. v. Holmes, supra*.

Section 40-902 does not apply to domestic carriers.

To argue that Section 40-902 prohibits use of the War Projects Insurance Rating Plan in Idaho by a foreign company is to argue then that under Idaho law it is entirely permissible for domestic carriers to make contracts of insurance on a premium basis on which no commission is payable by the carrier to any

agent or broker and that it is illegal, because of Section 40-902, for foreign carriers to make similar contracts within the state. The rankest and most unfair discrimination would be involved in such an interpretation.

E. Section 40-1107 of the Idaho Insurance Code does not prohibit use of the War Projects Insurance Rating Plan.

Section 40-1107 (App. 13) is a penal statute which prohibits rebating and specifies the sentences to be imposed in the event of conviction for violation of the provisions of the section.

1. Rebating not involved in use of the War Projects Insurance Rating Plan.

Rebating in general insurance practice is the improper return or reduction or discount made available to one person in a class by way of discrimination against other persons in the same class. "Of course, rebating generally is discrimination; * * *" 29 Am. Jur. p. 330.

"the object or intent of statutes aimed against discriminations and rebates is that uniform rates shall be established and maintained, so as to secure to all persons equality as to burden imposed, as well as to benefits derived, by preventing discrimination by insurers in favor of individuals of the same class, either as to premiums charged or dividends allowed, or, as it has been stated, in order that prospective insurants of the same class shall not be unfairly treated or discriminated against, by inducements being given to one of such class, which are not available for all here-

in." Couch, *Cyclopedia of Insurance Law*, Vol. 3, Sec. 584, beginning on page 1872.

The War Projects Insurance Rating Plan was not made applicable by way of preferential treatment by the defendants to the Walter Butler Company with respect to premiums payable on the Farragut Naval Training Station Project.

On the contrary, the plan was made applicable by the United States Navy to all of its large projects written on a cost-plus-a-fixed-fee basis wherever those projects were located throughout the country.

There was no selection of the plan either by the defendants or by the insured. *The plan was required on the project by the United States Navy.* There was no rebating or discrimination in its use by the defendants on this project.

The War Projects Insurance Rating Plan was submitted for approval in every state under the laws of which the rates for Workmen's Compensation Insurance or Automobile Liability Insurance or General Liability insurance were subject to approval. The test generally applicable to rates and rating plans in all states where the rates are subject to approval are that the rates shall be adequate and that they shall not be excessive or unfairly discriminatory. In many of these states, there are additional laws against rebates, yet in state after state, the War Projects Insurance Rating Plan was approved (Brief p. 89, *infra*).

2. *There was no "rebate of or part of the premium payable on the policy or on any policy or of the agent's commission thereon" within the meaning of the first part of Section 40-1107.*

The first part of the first paragraph of Section 40-1107 provides that:

"No insurance company, association or society, by its or any other party, and no insurance agent, solicitor or broker, personally or by any other party, shall offer, promise, allow, give, set off or pay, directly or indirectly, as inducement to insurance or in connection therewith, on any risk in this state, nor or hereafter to be written, *any rebate of or part of the premium payable on the policy or on any policy or of the agent's commission thereon;*"

The words "the premium payable on the policy" must necessarily mean the final earned premium payable on the policy. The defendants, the insured and the United States Navy all indicated from the very inception of the undertaking when the binder was first issued (Ex. 24, R. 203), and throughout the undertaking, that the final premium for the risk was the premium earned in accordance with the requirements of the War Projects Insurance Rating Plan.

The interim payments provided for were simply a means of providing the defendants with necessary funds to pay claims and to administer the risk until the final earned premiums were determined.

In order to have any rebate "of the agent's commission thereon," it is entirely clear that some commission must have been a part of the plan initially. The case of *Smith v. Kleinschmidt* (Mont.) 187 Pac. 894, shows clearly what a rebate of commission is.

No commission having been fixed, either by law or by agreement, as payable by the defendants under the policies subject to the War Projects Insurance Rating Plan and no commission in fact having been paid by the defendants to any agent or broker under these policies, Section 40-1107 can have no application whatsoever to this case.

This penal provision of the Idaho Code in relation to commissions means no more than that an agent may not promise or give to a prospective insured or to an insured some part or all of the commission which the agent is entitled to when the insurance is placed, so as to give to that insured some preferential treatment not accorded to others in the same class.

3. The War Projects Insurance Rating Plan was not used as an inducement to insurance.

There are three main parts to the first paragraph of Section 40-1107. The parts are divided by semicolons. Each one of the parts contains the following qualifying words, no one of the parts being applicable unless the practice prohibited in the particular part was used:

“as an inducement to (such) insurance or in connection therewith.”

The words appear in the first part, once in the second part, and again in the third part without the word “such.” They also appear once in the second part with the word “such.”

Obviously, neither the defendants nor any other party used or offered to use the War Projects Insurance Rating Plan as an inducement to the insurance afforded the Walter Butler Company.

The War Projects Insurance Rating Plan was simply a rating method used in conjunction with the insurance afforded. Its use was required by the United States Navy on the project. It was in no way an under-cover or outside arrangement which the defendants used as a means of securing the insurance.

The words "*or in connection therewith*" follow the words "*as an inducement to insurance*" each time that the latter words are used in the section except at the end of the first paragraph. We believe that the words "*or in connection therewith*" are intended to mean and do mean in connection with an inducement to insurance. As a practical matter, when rebate or unfair discrimination are offered or promised or involved, they are almost invariably promised or offered at the time that the insurance is placed.

It is immaterial, however, whether the prohibitions apply only in relation to inducements to insurance or apply generally in connection with insurance, since the War Projects Insurance Rating Plan is in no sense a rebate in any event.

The Plan was used in state after state (R. 133).

See Haugh, "The Comprehensive Insurance Rating Plan," Vol. XXVIII, Part II, No. 58, Proceedings of the Casualty Actuarial Society.

Had there been any basis for the plaintiff's claim that the use of the plan was illegal because it constituted a rebate within the meaning of the rebating statutes, the plan would certainly not have been approved in states, where rates were subject to approval nor would it have been permitted in the other states

which have anti-rebate laws, but which did not at that time have rate regulatory laws.

4. Prohibition of allowance “* * * which is not specified, promised or provided for in the policy contract of insurance; * * * nor except as specified in the policy contract.”

Workmen's Compensation and Employers' Liability Policy WUB-863386 Automobile Liability Policy WSLA-863388 and General Liability Policy WSLG-863387 were issued on May 18, 1942. War Projects Insurance Rating Plan Endorsement 3016 was attached to and made a part of the Compensation Policy. Paragraph 7 of general endorsement 3015, which is a part of the Automobile policy, and paragraph 11 of general endorsement 3014, which is a part of the General Liability policy, provided that the premiums for such policies were to be computed in accordance with the provisions of the War Projects Insurance Rating Plan Endorsement attached to the Compensation policy (See Def. Ex. 8, R. 122).

The Compensation Policy WPB-863386 was written on a policy form of the Edition of July 1933. The 'Declarations' page of that policy did not contain a printed notation reading 'Symbol numbers of endorsements forming a part of the policy on its effective date,' nor a space immediately following that printed notation for typewritten entry of the symbol numbers of such endorsements, such as were incorporated in the later edition Compensation, Automobile and General Liability forms.

The 'Declarations' page of WUB-863386 as issued

contains typewritten notation relating to endorsement 3013 in items 1 and 7, to schedule 2921 in two places in item 3, and to endorsement 2776 in item 3. These entries were in accordance with company practice existing at the time that this policy was issued.

“There was no typewritten record on the ‘Declarations’ page of WUB-863386 of the following endorsements:

3016—War Projects Insurance Rating Plan Endorsement

11-2990—Idaho Compensation Statutory Endorsement

because it was not Company practice at that time on that policy to enter typewritten record on the ‘Declarations’ page of the numbers of such endorsements. Both of these endorsements were attached to the policy however and both formed a part of the policy at the date of issue.

The policy could have had no application whatever with respect to the Workmen’s Compensation Law of Idaho unless endorsement 11-2990, which cites the Compensation Act of Idaho and makes the policy applicable in relation thereto had formed a part of the policy at its date of issue. If endorsement 11-2990 was not attached to and did not form a part of the policy, the policy had no application in Idaho and in that event nothing in Idaho law had anything to do with the policy.

Mrs. Michaelson testified on cross-examination that she saw the War Rating Plan Endorsement when the policy was countersigned (R. 243).

Mr. Peterson testified that Endorsement 3016 and Endorsement 11-2990 were attached to the policy at its time of issue (R. 212).

There is clear evidence on the "Declarations" page of WUB-863386 that Endorsement 3016 was attached to and did form a part of the policy at its date of issue. The typewritten entry on the "Declarations" page reading:

"Deposit premium for this policy \$44,517.75."

is for an amount which is exactly 15% of the estimated advance premium of \$296,785.00 which is shown on the "Declarations" page of the policy. The deposit premium of 15% was in accordance with the requirement of Paragraph 3 of the War Projects Insurance Rating Plan Endorsement No. 3016.

Had Endorsement No. 3016 not been attached to the policy at its inception, the entire estimated advance premium would have been payable and the Declarations page would have contained no reference to a deposit premium.

Endorsements issued during the policy period, all interim premium payment, preliminary premium adjustment and final premium adjustment were all in accordance with the provisions of Endorsement 3016 and all further established the fact that that endorsement was attached to and formed a part of Policy WUB-863386 when that policy was issued on May 18, 1942.

Accordingly, those parts of §40-1107 which apply to certain undertakings outside of the policy contract have no application to this case. Indeed, even

if the endorsement was not attached to the policy at the time it was countersigned, that would be a fact of which only the insured could take advantage, not the countersigning agent. However, the trial court found that the War Projects Insurance Rating Plan endorsements were attached to the policies issued under the Plan (R. 82).

6. The contention that the \$5 per month contract is void as against public policy.

This matter has been fully discussed above, page 14, 44. In that connection we again call the court's attention to *Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co.* (Pa.) 190 Atl. 924, entirely ignored in appellant's brief, although fully discussed and commented upon by the appellees in the argument below. None of the cases cited by counsel holds to the contrary.

Appellant concedes that the \$5-per-month contract would apply to small premium policies (App. Br. 13, 41-2, 48). He apparently contends the contract inapplicable to large premium policies. However, the agreement doesn't say so. No more effort is required in the occasional signing of large premium policies than small ones. The trial court upheld both the validity of the contract and its applicability to the policies here involved (R. 87).

7. The contention that the plaintiff has a direct cause of action under the statute for commissions.

Appellant contends that a direct cause of action has been conferred in appellant's favor for commissions. Indeed, this contention is essential to her position, for even if she is entitled to commissions, un-

less the statute gives her a cause of action therefor she cannot recover. We also pointed out that no such remedy is conferred by the statute. The trial court with reference to the contention that a remedy was conferred, rejected that contention and said (R. 75):

“The Court cannot write remedies into the statute which are not specifically mentioned.
* * *”

Certainly there is nothing in the decisions relied on by the appellant, pp. 66 to 68, which announces anything except general statements which may be perfectly sound in the particular cases involved but which can have no application here under the provisions of the Idaho statute which contemplated administrative remedies by the state rather than a private remedy by the countersigning agent.

CONCLUSION

Following the decision on the first appeal in the *Ware* case (150 F.(2d) 463) this court remanded the case back to the District Court for the express and specific purpose of ruling on questions not theretofore ruled upon by the District Court. On remand the court stated:

“However, the court below did not rule on these questions and we do not feel called upon to decide problems of local law of such consequence without benefit of the contribution which the Federal Judge in Idaho is in a position to make. Moreover, the questions may more intelligently be considered in the light of all the facts as disclosed in the course of a trial.

In compliance with the mandate of this court, the District Court considered each of the questions involved and the contentions of the respective parties and resolved all controlling issues, both of fact and of law, in favor of appellees. This, the District Court did "in the light of all the facts as disclosed in the course of a trial" and the decision of the District Judge represents, to use the language of the opinion of this court, "the contribution which the Federal Judge in Idaho is in a position to make."

It is respectfully submitted that the contribution so made by the Federal Judge is clearly right and that the trial judge's findings and conclusions are supported by the evidence and by the law and that his judgment of dismissal should be affirmed.

Respectfully submitted,

CHARLES HOROWITZ,

WM. S. HAWKINS,

Attorneys for Appellees.

PRESTON, THORGRIMSON & HOROWITZ,

Of Counsel,

APPENDIX

The court stated, *Ware v. Travelers Ins. Co., et al.*, 150 F.(2d) 463, p. 464:

“Appellees contend that the Idaho statute has no application to the policies and bonds written in this instance, inasmuch as they were not negotiated or written in Idaho. They say, too, that the phrase ‘full commission’ has no meaning as applied to a situation where no agent has received a commission. They argue, further, that the statute is not to be read into Ware’s contract; and that assuming a right of recovery is intended to be conferred on the agent, nevertheless the right may be waived, and in this instance impliedly was waived by Ware in his contract with the companies. However, the court below did not rule on these questions and we do not feel called upon to decide problems of local law of such consequence without benefit of the contribution which the federal judge in Idaho is in position to make. Moreover, the questions may more intelligently be considered in the light of all the facts as disclosed in the course of a trial.”

That statute read as follows (R. 88, §40-902):

“Foreign Companies — Resident Agents—
Countersigning Policies. It shall be unlawful for any foreign insurance company doing business in this state to make, write, place or cause to be made, written or placed in this state any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state, legally commissioned and licensed to transact insurance business herein. A resident agent shall

countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premium is paid, except when said policy is made, written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than five per cent of the premium paid: * * * provided this section shall not apply to life insurance companies."

Rule 52(a) :

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *."

Section 40-1002:

"NON - RESIDENT AGENTS — RECIPROCITY — SPECIAL AGENTS. If, by the laws of any other state, residents of the state of Idaho, are prohibited from holding license to represent life insurance companies or to solicit life insurance in such other state, the department shall refuse to issue agent's certificates of authority for the solicitation of life insurance in this state to residents of such other state: provided, that a license may be granted to a special agent of such other state authorizing such agent to work with and assist local agents in this state in writing business, but in all such cases the local agent is to retain his full commissions. Each non-resident special agent granted a license under this provision shall pay an annual fee of five dollars, and all licenses issued therefore shall expire on the thirty-first day of March subsequent to the date of issue."

Section 40-1501 of Chapter 15 reads:

"FIRE INSURANCE BROKER DEFINED—'Broker,'

or 'fire insurance broker,' as used in this chapter, is any person, copartnership or corporation, who, for compensation, not being a licensed resident insurance agent, acts or aids in any manner in negotiating contracts or fire insurance or reinsurance or placing fire risks or effecting fire insurance or reinsurance for a person other than himself or itself."

Section 65-510:

"STATUTES AND RESOLUTIONS — WHEN EFFECTIVE — No act shall take effect until sixty days from the end of the session at which the same shall have been passed except in case of emergency, which emergency shall be declared in the preamble or body of the law.

"Every joint resolution, unless a different time is prescribed therein, takes effect from its passage."

Chapter 145, Laws 1915, page 318:

"Sec. 31. It shall be unlawful for any foreign insurance company doing business in this State to make, write, place or cause to be made, written or placed *in this State* any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident, situated or located in this State, unless done through an agent who is a resident of this State, legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the *full* commission when the premium is paid, to the end that the State may receive the tax required by law to be paid on the premiums collected for insurance on all persons and property resident or located within this State.

Provided, this section shall not apply to life insurance companies."

Section 40-809:

"ANNUAL STATEMENT — FILING AND CONTENTS—* * * Every foreign insurance company, except life insurance companies, doing business in this state shall cause to be attached to said statement the affidavit of its president, manager or chief executive officer in the United States to the effect that all policies, bonds, duplicate policies or contracts of insurance of every kind and character, and all general and floating policies upon persons and property, resident, situated or located in this state, made, written, placed and caused to be made, written and placed in this state by said company during the year covered by said statement were so done only through agents, resident within this state and legally commissioned and licensed to transact insurance business therein; and that said resident agents had received, or, if the business is still pending, would receive the full commission therefor, when the premiums were severally paid * * *."

Section 40-803:

"ANNUAL TAX STATEMENT AND TAX—FIRE AND MARINE COMPANIES—All insurance companies licensed to transact business in this state in Classes 1 and 2, or either of them, of chapter 3 of this title, shall file with the department of finance annually on or before the first day of March of each year, a statement, under oath, showing the amount of all gross premiums received by said company on risks situated in this state during the year ending December thirty-first next preceding and pay to the department a tax of three per cent on the amount of such

gross premiums collected in excess of premiums and cancellations returned to such policyholders.”

“40-804. ANNUAL STATEMENT AND TAX — OTHER COMPANIES. All insurance companies licensed to transact business in this state in one or more of classes 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of chapter 3 of this title shall file with the department of finance annually on or before the first day of March of each year, a statement, under oath, showing the amount of all gross premiums received by said company on risks in this state during the year ending December thirty-first next preceding, and shall pay to the department a tax of three per cent, on the amount of such gross premiums collected in excess of premiums and cancellations returned to such policyholders; provided, however, that only such companies licensed to transact business in class 3 may in computing the gross premiums also deduct the amount of dividends and coupons paid policyholders.”

Section 40-901 (Before Ch. 258 1947 Idaho Laws):

“RISKS MUST BE WRITTEN IN AUTHORIZED COMPANIES BY LICENSED AGENTS. All insurance covering persons or property in this state must be written in companies authorized to transact business in this state, and only through their licensed agents; and all such insurance, excepting life insurance, must be written only through licensed agents residing within this state: provided, that the provisions of this section shall not apply to policies of reinsurance.”

Section 40-902 was amended in 1939 to read as follows (Before Ch. 258 1947 Idaho Laws):

“FOREIGN COMPANIES — RESIDENT AGENTS—
COUNTERSIGNING POLICIES—It shall be unlawful

for any foreign insurance company doing business in this state to make, write, place or cause to be made, written or placed in this state any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state, legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premium is paid, *except when said policy is made, written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than 5% of the premium paid*: * * * provided, this section shall not apply to life insurance companies."

Section 40-901, effective July 1, 1947, has been changed. The amended statute requires of countersigning agents with reference to countersigning policies that they (Ch. 258 1947 Laws of Idaho)

"collect the premiums therefor, and * * * keep a record of the same, which shall contain the usual and customary information concerning the risk undertaken, including the full premium paid or to be paid therefor, to the end that the State may receive the taxes required by law to be paid on premiums collected for insurance on property or undertakings located in this State; * * *."

Class a:

Arizona—Insurance Code of 1941—Pamphlet Edition, Including 1943 Amendments—Section 61-332

Montana—Chapter 62, Laws of Montana—1941—

Section 1—But with a separate provision (Section 3) dealing with risks located within the state but contracted or originating outside the state

Pennsylvania—Laws of Pennsylvania—1933, Act No. 215, Section 610

South Dakota—South Dakota Insurance Laws 1942—Pamphlet Edition, Section 31.2218

New York—Consolidated Laws of New York, Chapter 28, Article 6, Section 130

North Carolina—Insurance Laws of North Carolina—Reprint from General Statutes of North Carolina 1943 and 1945 Cumulative Supplement, Section 58-41

Class b:

Colorado—Annotated Insurance Laws of the State of Colorado—1940—With Amendments and Additions Enacted by the 1945 General Assembly—Section 191

Delaware—Insurance Laws, State of Delaware—1940—Including Amendments through General Sessions—1945—Pamphlet Edition Para. 478, Section 17.

Iowa—Iowa Insurance Code, 1935 as Amended by 1939 Session Laws, Chapter 28 S.F. 164, Section 2. Section 4 deals with proposals originating outside the state and the commissions payable to a countersigning agent by reason thereof

Kansas—General Statutes, 1935 as Amended by Section 1, Chapter 250, Laws of 1937, Section 40-246

Kentucky—Kentucky Insurance Laws—1943—Pamphlet Edition, Section 298.150

Washington—Remington's Revised Statutes, Section 7080.

Similar provisions are contained in the insurance statutes of the states of Michigan, Mississippi, Ohio, Oregon, South Carolina, Utah, West Virginia and Wyoming.

See, for example:

Class c:

Massachusetts — While requiring countersignature, Chapter 175, Annotated Laws of Massachusetts, Section 157 expressly provides "This section shall apply only to acts done and contracts made within the Commonwealth."

Nevada — General Insurance Laws, 1941 — Pamphlet Edition, Section 154 expressly provides for a 5% payment to the countersigning agent subject to a minimum of \$1 and maximum of \$50.

Virginia—Code of Virginia, §§4222, *et seq.*

Virginia

Section 4222. * * * (a) Insurance companies, legally authorized to do business in this State, except life, title and ocean marine insurance companies, shall not make contracts of insurance or surety on persons or property herein, except through regularly constituted and registered resident agents or agencies of such companies; no contract of insurance or surety covering persons or property in this State, except contracts of life, title and ocean marine insurance and except temporary binders covering other forms of insurance shall be written, issued or delivered by any such authorized insurance company, or any representatives, unless such contract is duly countersigned in writing by a resident agent or agency of such company; provided, however, that the countersignature of an insurance agency shall not be considered valid unless such countersignature be attested to in writing by a

regularly constituted and registered resident agent of such company.

No State agent, special agent, company representative, salaried officer, manager or other salaried representative of any legally authorized insurance company, except a mutual insurance company, shall countersign any contract of insurance or surety, or any renewal thereof, covering persons or property in this State, except contracts of life, title and ocean marine insurance, provided that this section shall not apply to railroad companies and other common carriers engaged in interstate commerce.

* * * * *

Section 4426-a. No resident agent or agency may write, countersign, issue or deliver any contract of insurance or surety upon persons or property in this State unless there shall be collected at the time the contract is written, issued or delivered, or within a reasonable time thereafter, the full premium on such contract, and the resident agent or agency shall be entitled to and shall receive the usual and customary commissions allowed on such contracts, provided that such resident agent or agency may write such contracts at the request only of such other resident agents or agencies, when such agent or agencies are properly licensed to transact the class of business involved in such exchange, and licensed non-resident insurance brokers who may be authorized by law to broker such contracts, and on exchange of business between resident agents or agencies in Virginia and licensed non-resident insurance brokers in other states the resident agent or agency in Virginia may allow or pay to such licensed non-resident insurance brokers, a commission not exceeding fifty per centum of the resident agent's or agency's commission allowed on such business.

The Montana statute is quoted in *Springfield Fire & Marine Ins. Co. v. Holmes*, 32 Fed. Supp. 964 at page 967. Section 1 provided:

Section 1:

“It shall be unlawful for any insurance company * * * doing business within the State of Montana * * * to make, write, place, or cause to be made, written or placed in this State, any policy, bond, duplicate policy, contract of insurance or contract of indemnity of any kind or character, or any general floating group policy upon persons or property, or upon any insurable risk, resident, situated or located in this State, unless written through and countersigned by an agent of this State, duly licensed to transact insurance, bonding or indemnity business therein.

“A resident agent shall countersign all policies, bonds or contracts of indemnity so issued, and shall receive the full commission on all such policies, bonds or contracts of insurance on indemnity, when the premium is paid, to the end that the State may receive the tax required by law to be paid on the premiums collected for insurance on all persons, property or other insurable risks resident, situated or located within the State; provided that nothing in this act shall be construed to prevent any insurance company or association from issuing policies, bonds or contracts (of insurance) at its principal or department offices, covering property or persons or other insurable or indemnity risks resident, situated or located in this State; provided, however, such policies are issued upon application, procured and submitted to such company or association by a resident agent, who shall keep a

record of all such policies, bonds or contracts of indemnity so issued, and countersign the same, and that said resident agent or agents shall receive the full commission on all policies when premium is paid. It shall be unlawful for any such resident agent to rebate or divide such commission, with intent to evade the provisions of this act; and any violation of this provision shall be punished as provided in Sections 6123 and 6124 Revised Codes of Montana, 1935 * * *.

Section 40-906:

“PENALTY FOR ACTING AS AGENT WITHOUT LICENSE—It shall be unlawful for any person to act within this State as an agent, or otherwise, in soliciting or receiving application for insurance of any kind or class whatever, or in any manner, directly or indirectly aid in the transaction of the business of any insurance company incorporated in this State or out of it without first procuring a certificate of authority from the department of finance.

“Any person who solicits or aids in soliciting business for any insurance company without the certificate herein required, or after such certificate has been withdrawn or revoked, or any agent who accepts an application from any person who is a non-resident of this state, or a resident thereof not provided with the certificate of authority for an agent, as herein required, and in any way compensates or promises to compensate such person from whom he receives such application shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$100.00, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

“Nothing in this Act shall be considered as prohibiting the authorized agent of any company, duly licensed to transact such business in this State, from exchanging business with the authorized agent of any other company licensed to transact the same character of business in this state: providing that the provisions of this section shall not apply to the salaried officers or representatives of Reciprocal or Interinsurance Exchanges or of the attorneys-in-fact thereof who do not work on a commission basis.”

Section 40-809:

“ANNUAL STATEMENT—FILING AND CONTENTS —All insurance companies licensed to do business in this state, unless otherwise provided in this act, shall file with the department of finance annually, on or before March first, in each year, a statement under oath, upon a form to be prescribed and furnished by the department, stating the amount of all premiums collected or contracted for by the company making such statement, in this state, during the year ending December thirty-first next preceding; the amounts actually paid policyholders on losses; the amounts paid policyholders as return premiums; the amounts paid policyholders as dividends; the amount of insurance reinsured in other companies authorized to do business in this state, and the amount of premiums paid therefor; and the amount of insurance reinsured in companies, naming premiums paid therefor; and the amount of reinsurance accepted from admitted companies and the premiums received for such reinsurance on residents located in this state, with the names of the companies so reinsured.

“Every foreign insurance company, except life

insurance companies, doing business in this state shall cause to be attached to said statement the affidavit of its president, manager or chief executive officer in the United States to the effect that all policies, bonds, duplicate policies or contracts of insurance of every kind and character, and all general and floating policies upon persons and property, resident, situated or located in this state made, written, placed and caused to be made, written and placed in this state by said company during the year covered by said statement were so done only through agents, resident within this state and legally commissioned and licensed to transact insurance business therein; and that said resident agents had received, or, if the business is still pending, would receive the full commission therefor, when the premiums were severally paid.

“No license shall be issued to any company until such annual statement and affidavit, if required, be filed.

“The annual statement made to the department pursuant to this section, or other provisions of law, shall include the substance of that required by what is known as the convention blank form, adopted from year to year by the national convention of insurance commissioners, and shall also include such other information as may be required by the department.”

Section 40-1107:

“REBATING PROHIBITED — No insurance company, association or society, by itself or any other party, and no insurance agent, solicitor or broker, personally or by any other party, shall offer, promise, allow, give, set off or pay directly or indirectly, as inducement to insur-

ance or in connection therewith, on any risk in this state, now or hereafter to be written, any rebate of or part of the premium payable on the policy or on any policy or of the agent's commission thereon; nor shall any such company, association or society, agent, collector or broker, personally or otherwise, offer, promise, allow, give, set off or pay, directly or indirectly, as inducement to such insurance, or in connection therewith, any earnings, profit, dividends or other benefit, founded, arising, accruing or to accrue on such insurance or therefrom, or any other valuable consideration as inducement to insurance or in connection therewith, which is not specified, promised or provided for in the policy contract of insurance; nor shall any such company, association or society, agent collector or broker, personally or otherwise, offer, promise, give, sell or purchase, as inducement to insurance or in connection therewith, any stock, bonds, securities or property, or any dividends or profits accruing or to accrue thereon, nor except as specified in the policy contract, offer, promise, or give any other thing of value whatsoever, as an inducement to insurance.

“No insured person, firm or corporation shall knowingly receive or accept, directly or indirectly, any rebate or premium or part thereof, or agent, solicitor or broker's commission thereon, payable on the policy, or on any policy of insurance or any special favor or advantage in the dividend or other benefit to accrue thereon; nor shall any such person, firm or corporation receive anything of value as an inducement to insurance or in connection therewith, which is not specified, promised or provided for in the policy contract of insurance.

“Any company, association, society, officer, solicitor, agent, broker or other person who violates any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of \$100.00 for each and every violation, or to imprisonment in the county jail for a period of not less than ninety days nor more than six months, or both such fine and imprisonment.

“The department of finance shall have authority in its discretion to revoke the license therefore issued to any company, association, society, agent or broker convicted of a violation of the provisions of this section.

“Any employee of any person, firm or corporation who shall receive, directly or indirectly, any rebate of premium or part thereof payable on a policy of insurance issued to the person, firm or individual by whom he is employed, or who receives any part of any agent’s commission payable on the policy issued to such person, firm or corporation, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine not exceeding \$100.00, or imprisonment in the county jail for not more than thirty days, or both such fine and imprisonment, for each and every such offense.

“Nothing in this section shall be so construed as to prohibit any company issuing nonparticipating life insurance from paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of the surplus accumulated from nonparticipating insurance; nor to prohibit any company transacting industrial insurance on the weekly payment plan from returning to policyholders who have made premium payments

for a period of at least one year directly to the company at its home or district offices, a percentage of the premiums which the company would have paid for the weekly collection of such premiums; nor to prohibit any life insurance company, doing business in this state, from issuing policies of life or endowment insurance with or without annuities, at rates less than the usual rates of premiums for such policies, insuring members of labor organizations, lodges, beneficial societies or similar organizations, or employees of any employer who, through their secretary or employer may take out insurance in an aggregate of not less than fifty members and pay their premiums through such secretary or employer."

Section 40-708:

"EXAMINATION OF FOREIGN COMPANIES. The department of finance shall have the same supervision, and, when it deems it necessary make the same examinations of the business and affairs of every foreign insurance corporation doing business in this state, as of domestic insurance corporations doing the same kind of business, and of its assets, books, accounts and general condition. Every such foreign corporation, its agents and officers, shall always be subject to the same laws, rules and penalties as are imposed upon domestic insurance corporations doing the same kind of business, so far as the same are applicable thereto."

Section 40-711:

"CERTIFICATE FROM COMMISSIONER OF ANOTHER STATE. A certificate from the insurance commissioner of any state, who has recently examined the affairs of any company, may be accepted as evidence of the condition of the company, in lieu of the examination herein required."

Section 40-712:

“IMPAIRMENT OF CAPITAL — ASSESSMENT OR REDUCTION. Any insurance company transacting business within this state, whose capital stock shall become impaired to the extent of twenty-five per cent thereof, shall make good such impairment within sixty days by either an assessment upon the stockholders or the reduction of its capital stock: provided, that such capital stock shall in no case be less than the minimum amount provided by this act; and in the event of failure to make good such impairment within the said time, shall forfeit its rights to write any new business in this state until said impairment shall have been made good.”

Section 43-1601:

“MEANS OF SECURITY — QUALIFICATIONS OF SURETY AND LIABILITY COMPANIES — DEPOSITS OF SUCH COMPANIES — Employers, but not including the state or the municipal bodies mentioned in section 43-903, shall secure compensation to their employees in one of the following ways:

“1. By insuring and keeping insured the payment of such compensation in the state insurance fund; or,

“2. By depositing and maintaining with the industrial accident board security satisfactory to the board securing the payment by said employer of compensation according to the terms of this act. Such security may consist of a surety bond or guaranty contract with any company authorized to do surety or guaranty business in Idaho and having a sufficient deposit with the state treasurer upon which execution may lawfully be issued against said company on behalf of any

workman secured under said bonds or contracts.

“No company shall be permitted to write surety bonds or guaranty contracts covering the liability hereunder of employees of this state unless it shall have been authorized to do business under the laws of this state and until it shall have received the approval of the board. Provided that any company approved by the board and duly authorized and licensed to write liability insurance in this state and having on deposit with the state treasurer or the department of finance evidences of indebtedness or securities in the amount of \$100,000.00 of the class or classes eligible for investment in or representing the minimum capital required of a domestic liability insurance company of the state and which company deposits and maintains with the state treasurer of the state the securities specified in this section in an amount equal to the total amounts of all of the outstanding and unpaid awards against such company shall be permitted and authorized to write the surety bonds or guaranty contracts specified in this section covering the liability of the employers of the state and securing payment by said employers of the compensation required by the Workmen’s Compensation Act; but this proviso shall not be construed to apply to any company making insurance in Class 5, as defined in section 40-306, Idaho Code Annotated. To the end that the workmen secured under this act by any such company shall be adequately protected the board is hereby authorized to make and change such reasonable regulations as they may deem necessary with reference to the capital stock, surplus and reserves of such companies, and to require such companies, self-insuring employers and the state fund to deposit and maintain with

the treasurer of the state money or bonds of the United States or of this state, or interest paying bonds when they are at or above par, or any other state of the United States or the District of Columbia, or the bonds of any county or municipal corporation of this or any other state of the United States or the District of Columbia in an amount equal to the total amounts of all outstanding and unpaid compensation awards against such employer or such company or the state fund or against the employers insured by such company or the state fund. In lieu of such money or bonds the board may require such company, self-insuring employer or the state fund to file or maintain with the treasurer of the state a surety bond of some company or companies authorized to do business in this state for and in the amounts equaling the total unpaid compensation awards against such company, self-insurer or state fund.

“The approval by the board of any such company may be withdrawn if it shall appear to the board that workmen secured therein under this act are not fully protected.

“The said money or bonds or said surety bonds so deposited with the state treasurer shall be an exclusive trust for the benefit of the workmen of the employers insured by such company or state fund or such self-insurers, to remain with said treasurer in trust to answer any default of said self-insurer or of said company or state fund as surety upon any such obligation established by final judgment upon which execution may lawfully be issued against said self-insuring employer or company or state fund; such self-insurer or company or state fund, however, at all

times shall have the right to collect the interest, dividends and profits upon such securities, and from time to time withdraw such securities or portion thereof, substituting therefor others of equally good character and value, to the satisfaction of the industrial accident board, and such securities shall not be sold under any process against such self-insurer or such company or state fund until after forty days notice to said self-insurer or company or state fund, supplying the date, place and manner of such sale, and the process under which and the purpose for which it is to be made, accompanied by a copy of such process. The state of Idaho shall be held responsible for the safety of all deposits made under the provisions of this section. Such self-insurer or company or state fund shall not be permitted to withdraw from the state treasurer such deposits of money or bonds or permit said surety bonds to lapse for a period of one year after discontinuing business within this state, or while any suit is pending or any judgment against said company in this state shall remain unpaid.

“The board is also authorized to make and change such rules and regulations as they shall deem necessary to secure the prompt payment of compensation awards under this act, and shall withdraw their approval of any company, whenever it appears that such company unnecessarily delays the payment of such awards.”

Section 40-903:

“PENALTY FOR VIOLATION BY COMPANY. Any company wilfully failing to observe or comply with the provisions of section 40-901 and 40-902 shall be subject to and liable to pay a penalty of \$500.00 for each violation thereof and for each

failure to observe and comply with the said sections. Such penalty may be collected and recovered in an action brought in the name of the state in any court having jurisdiction thereof. Any insurance company or association which shall neglect or refuse for thirty days after judgment, in any such action, to pay the amount of such judgment, shall have its authority to transact business in this state revoked by the department of finance, and such revocation shall continue for at least one year from date thereof, nor shall any insurance company or association whose authority to transact business in this state shall have been revoked be again authorized or permitted to transact business herein, until it shall have paid the amount of each judgment and shall have filed in the office of the department of finance a certificate to the effect that the terms and obligations of the provisions of these sections are accepted by it as a part of the right and authority to transact business in this state."

Section 40-807:

"PENALTY FOR FAILURE TO PAY TAX. An organization failing or refusing to render such statement and pay the required tax of three per cent thereon for more than thirty days after the time so specified shall be liable to a fine of twenty-five dollars for each additional day of delinquency, and the taxes may be collected by distraint and same recovered by an action to be instituted by the attorney-general in the name of the state in any court of competent jurisdiction. The department of finance shall revoke the license of any delinquent company until the taxes and fine, should any be imposed, are fully paid, and notice thereof is given to the department."

The Pennsylvania statute:

"The Act of May 17, 1921, P.L. 682, art. 5, §501 (40 P.S. §631), which is a re-enactment of the Act of May 8, 1899, P.L. 258, provides, in part, as follows:

" 'No stock fire insurance company, association, or exchange, not incorporated under the laws of this State, authorized to transact business herein, shall make, write, place, or cause to be made, written, or placed, any policy, duplicate policy, or contract of insurance of any kind or character, or any general or floating policy upon property situated or located in this State, *except after the said risk has been approved in writing by an agent who is a resident of or whose principal place of business is in this State, regularly licensed to transact insurance business herein, who shall countersign all policies so issued, and receive the commission thereon when the premium is paid*, to the end that the State may receive the taxes required by law to be paid on the premiums collected for insurance on all property located in this State'."

Section 40-508:

"LIABILITY INSURANCE COMPANIES — QUALIFICATIONS. Any foreign stock insurance company making insurance in this state under class 6 of chapter 3 of this title shall have a capital stock of at least \$200,000 fully paid, and a surplus of not less than \$100,000; but such company shall not make insurance in this state in any other of said classes of insurance specified in said section except in classes 4, 5, 7, 8, 9, 10, 11, 12 and 14; and it shall not make insurance in class 5 without having additional capital of at least \$100,000. Such company may make insurance in

one or all of the following classes: 4, 7, 8, 9, 10, 11, 12 or 14, when it has an additional capital of at least \$50,000."

"43-1604. EFFECT OF FAILURE TO SECURE COMPENSATION. If an employer subject to the provisions of this act fails to comply with the provisions of section 43-1601, he shall be guilty of a misdemeanor and shall also be liable to a penalty for every day during which such failure continues of one dollar for each employee, to be recovered in an action brought by the industrial accident board in the name of the state of Idaho, and the amount so collected shall be paid into the industrial administration fund, and for this purpose, the district court of any county in which such employer carries on any part of his trade or occupation shall have jurisdiction.

"Furthermore, if any employer shall be in default under section 43-1601 for a period of thirty days, he may be enjoined, by the district court of any county in which such employer carries on any part of his trade or occupation, from carrying on his business while such default continues. All proceedings in the courts under this section are to be brought by the industrial accident board in the name of the state of Idaho."

"43-1605. INSURANCE CONTRACT. Every policy of insurance in the state insurance fund and every guaranty contract or surety bond covering the liability of the employer for compensation, shall cover the entire liability of the employer to his employees covered by the policy, bond or contract, and also shall contain a provision setting forth the right of the employees to enforce in their own names either by at any time filing a separate claim or by at any time making the

surety a party to the original claim, the liability of the surety in whole or in part for the payment of such compensation: provided, that payment in whole or in part of such compensation by either the employer or the surety shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid."

"43-1606. KNOWLEDGE OF EMPLOYER TO AFFECT SURETY. Every such policy and contract shall contain a provision that, as between the employee and the surety, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge as the case may be, on the part of the surety; that the jurisdiction of the employer shall, for the purpose of this act, be jurisdiction of the surety, and that the surety shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this act."

